88-706

No. 88-

Supreme Court, U.S.
FILED
OCT 26 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

POLICEMEN'S BENEVOLENT ASSOCIATION OF NEW JERSEY, LOCAL 318, and EDMUND GIORDANO, individually and as President of Local 318,

Petitioners,

—v.—

TOWNSHIP OF WASHINGTON, and JOHN ROBERTSON, Mayor,

Respondents.

PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Third Circuit erred in holding that a police department constitutes a pervasively regulated industry, such that police officers may be subject to random drug tests without a warrant, individualized suspicion or probable cause.
2. Whether the Third Circuit erred in holding that the pervasively regulated industry exception to the warrant and probable cause requirements of the Fourth Amendment applies to searches of people, as opposed to searches of property or inventory of the regulated industry, such that police officers are subject to warrantless drug tests without cause.
3. Whether the Third Circuit's reliance upon the pervasively regulated industry exception to the warrant and

probable cause requirement of the Fourth Amendment as justification for warrantless searches of public employees without probable cause or individualized suspicion contravenes this Court's ruling in O'Connor v. Ortega and conflicts with decisions from other courts of appeals.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

OPINIONS BELOW

The opinion of the United States District Court for the District of New Jersey (3a-89a), is reported at 672 F.Supp. 779 (D.N.J. 1987).

The opinion of the United States Court of Appeals for the Third Circuit (90a-125a) reversing the judgment of the district court is reported at 850 F.2d 133 (3d Cir. 1988). The order of the Court of Appeals denying the petition for rehearing and rehearing en banc (126a-127a) is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 21, 1988. Petitioners

filed a timely request for rehearing and rehearing en banc. On July 28, 1988, the Court of Appeals denied petitioners' request for rehearing and rehearing en banc (126a - 127a). This petition is being filed within 90 days of July 28, 1988. This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. §1254(1).

RELEVANT CONSTITUTIONAL PROVISION

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

This case arose out of a suit filed by Local 318 of the Policemen's Benevolent Association of New Jersey, the exclusive bargaining representative for all police officers (excluding certain superior officers) employed in Washington Township, New Jersey, and Edmund Giordano, a police officer and President of Local 318, against the Township of Washington, its Mayor John Robertson, and individual members of the Township's Council (5a-6a). The Union and Giordano sought an injunction on behalf of all current Township police officers against implementation of the Township's newly created "Employee Drug Testing Policy," which they asserted violated the rights of covered employees under the Fourth Amendment and Article I, Paragraphs 1, 2 and 7 of the New Jersey Constitution

(6a; 94a). Petitioners prevailed in the district court, which ruled that random drug testing in the absence of individualized, reasonable suspicion violated the Fourth Amendment and enjoined implementation of the Township's drug testing program (3a-89a).

On appeal, the Third Circuit reversed. Relying upon its prior decision in Shoemaker v. Handel, 795 F.2d 1136 (3d Cir.), cert. denied, 107 S.Ct. 577 (1986), the Third Circuit held that the pervasively regulated industry exception to the Fourth Amendment justified random and warrantless drug testing of Township police officers without probable cause or individualized suspicion (90a-125a). Accordingly, the Third Circuit vacated the district court's injunction and remanded the matter for

further proceedings consistent with its opinion (125a).[1/]

Washington Township is a small suburban community located in Gloucester County, New Jersey. On August 4, 1986, President Reagan called on every level of government to take steps to provide a drug-free work place. On August 5, 1986, Township Mayor Robertson sent a memorandum to all department heads and all municipal employees announcing that the Township would begin a mandatory drug testing program. (1a; 5a;

[1/] The Third Circuit noted that because "[t]he district court did not address the plaintiffs' contention that the plan also violated Article I, paragraphs 1, 2 and 7 of the New Jersey Constitution," it was remanding the matter without expressing any view "on the question whether the New Jersey Constitutional provisions on which the plaintiffs rely would afford greater protection from random or universal mandatory urinalysis of police officers than does the Fourth Amendment" (124a). At the same time, the Third Circuit cited a New Jersey Appellate Division decision involving police officers which so holds (Id. at n.7).

93a). The Mayor's announcement contained no guidelines or details regarding the testing program he proposed (1a-2a; 5a; 93a).

On September 12, 1986, Local 318 and its President filed suit in the United States District Court for the District of New Jersey, on behalf of Washington Township police officers.[2/] Petitioners sought a temporary restraining order as well as a preliminary and permanent injunction against the random drug testing of Township police officers (5a-6a).

In response to petitioners' request, the district court granted a temporary restraining order and directed the Township

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2/ Although Local 318's Complaint was filed only on behalf of the Township's police officers (5a-6a; 94a-95a), it is undisputed that the Township's drug testing program applies to all municipal employees (1a), regardless of job duty or position.

and its officers to appear and show cause why a preliminary injunction should not be granted. On September 19, 1986, the return date on the court's order, the Township indicated that no testing of police officers or other municipal employees had taken place and none would take place until drug testing guidelines were formulated and the court had an opportunity to review those guidelines. Based upon those representations, petitioners' application for a preliminary injunction was denied and the temporary restraining order was dissolved on October 8, 1986 (7a-8a).

Subsequently, the Township filed its Answer and the parties commenced a period of pretrial discovery (7a). On February 25, 1987, the Township submitted its "Revised Drug Testing Program of the Township of Washington," which is the plan at

issue in these proceedings (1a-2a; 7a). Stipulating that there were no genuine issues of material fact in dispute, the parties filed cross motions for summary judgment on the issue of whether certain aspects of the Township's proposed drug testing plan were violative of the Fourth Amendment to the United States Constitution and should be permanently enjoined. Specifically, petitioners stipulated that they were only challenging those aspects of the Township's drug testing plan which required random or mass testing of police officers, and those aspects of the plan which required testing as part of any pretextual physical examination (i.e., any physical examination which is not a bona

fide medical examination given in the ordinary course of business)(8a-9a).[3/]

The Township's drug testing program extends to all municipal employees, regardless of job title or responsibility, (1a; 9a), and provides for random drug testing without probable cause or individualized suspicion of either illegal drug use or job impairment as a result of drug use (10a).[4/] Under the plan, an employee randomly

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3/ Petitioners stipulated that they were not challenging those aspects of the Township's drug testing plan which provided for testing of municipal employees based upon reasonable suspicion or testing of all applicants for municipal employment (84a; 96a-97a). Petitioners also dismissed members of the Township Council as defendants (9a).

4/ The plan also provides for the institution of mandatory annual physical examinations for all employees, which shall include a urinalysis drug test (11a). In addition, all applicants for employment with the Township are required to submit a urine sample for testing and failure to do so or a positive test "will result in the rejection of the employment application." (11a).

selected for testing is required to urinate under government supervision and provide the urine specimen for chemical analysis (12a-15a). This testing will not be carried out at the work site; rather, the employee will be transported to an undetermined and undisclosed location. Employees will not be notified of the test until immediately prior to being transported to the testing site. The Township will also determine immediately prior to the test which drugs to test for. There is no limit or restriction regarding the nature of the test to be conducted (12a; 14a).

The urination will take place under the general supervision of a medical laboratory technician who will have the sole discretion to determine whether direct observation is warranted (13a). The tested employee "must submit a required minimum

amount of urine in an approved container." (Id.). Prior to being tested, each employee is required to fill out a medical questionnaire listing all drugs, both prescription and nonprescription, ingested during the past 30 days. (12a-13a). Any employee testing positive is subject to discipline and immediate discharge (15a-16a; 56a).

Although the Township indicated that its testing program was not developed for purposes of criminal prosecution (15a), there is nothing in the plan which would prevent any of the testing results from either being turned over to the appropriate authorities for criminal prosecution or being subject to a valid subpoena. Further, there are no specific provisions in the Township's plan regarding the manner and method for protection of the confiden-

tiality of either the testing results or the required medical questionnaire.

It is undisputed that the Township's drug testing program was not implemented in response to a real or perceived drug problem in either the Township's police force or municipal workforce as a whole, or in any segment thereof. Indeed, the Township offered no evidence that a single member of either the Township's police force or the rest of its municipal workforce has ever been involved in illegal drug use. (23a-24a; 62a-63a; 82a). The Township alleged only that drug abuse "is a statistically widespread problem in the United States", (62a), and that its testing program was implemented as part of a general effort to reduce illegal drug use (1a-2a). Further, the Township offered no evidence that it had considered other

alternatives that might achieve its stated objectives but be far less invasive of personal privacy.5/

Similarly, while the plan requires every current employee to submit to an annual urinalysis drug test as part of a newly instituted annual physical examination, it is undisputed that the reason for these medical examinations is to conduct an annual test for drugs. The Township's police officers have not previously been subject to any regular medical examinations or fitness for duty tests (81a-82a).

The Township's durg testing plan was struck down in its entirety by the district court. In a comprehensive opinion, the district court held that random drug

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5/ Indeed, the Township offered no evidence before the district court other than its drug testing plan.

testing of the Township's police officers is unconstitutional in the absence of individualized, reasonable suspicion based on objective facts and reasonable inferences drawn from those facts (3a-89a).

The district court's holding was based on several preliminary findings and conclusions. First, the district court ruled (consistent with every court to consider the issue) that urine testing is a "search" within the meaning of the Fourth Amendment (25a-26a). Second, the district court rejected the Township's contention that its random drug testing program is justified by the highly regulated industry exception to the Fourth Amendment (34a-41a). Third, the district court found that the annual physical examination contemplated by the plan is merely a pretext for random drug testing and "not a bona fide

medical fitness plan" (81a). Fourth, the district court concluded that the "Township has failed to demonstrate that it needs to undertake such 'carte blanche' random searches of its police officers," (61a-62a), and that testing based upon individualized, reasonable suspicion, will adequately serve the Township's interests (59a-61a). Finally, the district court noted that the Township's testing program "will subject the majority of innocent police officers to a highly intrusive search." (54a).

The Third Circuit reversed (90a-125a), based on its decision in Shoemaker v. Handel, 795 F.2d 1136 (3d Cir.), cert. denied, 107 S.Ct. 577 (1986), which held "that in a highly regulated industry such as horse racing, the administrative search

exception to the Fourth Amendment warrant requirement applie[s]." (99a).

The court's opinion detailed at length the statutory (106a-107a) and regulatory provisions (111a-121a) governing the general performance of New Jersey police officers. After reviewing these statutes and regulations, the panel observed "that the police industry is probably the most highly regulated, with respect to performance of its employees, of any industry in New Jersey." (121a). Solely on that basis, the Third Circuit upheld the Township's plan to subject its police officers to warrantless searches without probable cause or individualized suspicion.

REASONS FOR GRANTING THE PETITION

I. THE THIRD CIRCUIT ERRED IN HOLDING THAT A POLICE DEPARTMENT CONSTITUTES A PERVASIVELY REGULATED INDUSTRY, SUCH THAT POLICE OFFICERS MAY BE SUBJECT TO WARRANTLESS SEARCHES WITHOUT PROBABLE CAUSE OR INDIVIDUALIZED SUSPICION

The Fourth Amendment to the United States Constitution provides: "[t]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause . . ."

"The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State." Schmerber v. California, 384 U.S. 757, 767 (1966). It "protects people, not places." Katz v. United States, 389 U.S. 347, 351 (1967). Moreover, the values of individual privacy and

dignity are "'basic to a free society,'" Winston v. Lee, 470 U.S. 753, 760 (1985) (citations omitted).

In order to safeguard these interests, "one governing principle, justified by history and by current experience, has been followed: except in certain carefully defined classes of cases," Camara v. Municipal Court, 387 U.S. 523, 528 (1967), a search under the Fourth Amendment is unreasonable unless authorized by a warrant based upon probable cause. New Jersey v. T.L.O., 469 U.S. 325, 340 (1985).[6/]

Probable cause is presumptively required under the Fourth Amendment because it provides vital protection for the

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6/ Under the Fourth Amendment, a search occurs, giving rise to the Fourth Amendment's protections, when the government interferes "with an expectation of privacy that society is prepared to consider reasonable." United States v. Jacobsen, 466 U.S. 109, 113 (1984).

individual against arbitrary and unnecessary invasions of personal privacy by the government.7/ Even "a search . . . permissibly . . . carried out without a warrant . . . [ordinarily] must be based upon 'probable cause' to believe that a violation of the law has occurred." New Jersey v. T.L.O., 469 U.S. at 340.

> 'The requirement of probable cause has roots that are deep in our history.' Henry v. United States, 361 U.S. 98, 100 (1959). Hostility to [searches and] seizures based on mere suspicion was a prime motivation for the adoption of the Fourth Amendment, and decisions immediately after its adoption affirmed that 'common rumor or report, suspicion, or even 'strong reason to suspect' was not adequate to

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7/ The warrant is also presumptively required to ensure that the vital balance between individual privacy and governmental interest is struck in advance of the search by a neutral and detached magistrate. Marshall v. Barlow's, Inc., 436 U.S. 307, 322-323 (1978); United States v. Chadwick, 433 U.S. 1, 9 (1977).

support a warrant for arrest.' Id., at 101 (footnotes omitted).

Dunaway v. New York, 442 U.S. 200, 213 (1979). See Almeida-Sanchez v. United States, 413 U.S. 266, 270 (1973).

Furthermore, the Fourth Amendment clearly applies to protect the person and property of public employees. Government workers do not forfeit these protections "merely because they work for the government instead of a private employer." O'Connor v. Ortega, 107 S. Ct. 1492, 1498 (1987). Rather, "[s]earches and seizures by government employers or supervisors . . . of their employees . . . are subject to the restraints of the Fourth Amendment." 107 S.Ct. at 1497.[8/]

[8/] The strictures of the Fourth Amendment apply whether the government acts in a civil or criminal law enforcement capacity. O'Connor v. Ortega, 107 S. Ct. at 1497; New Jersey v. T.L.O., 469 U.S. at 335; Marshall v. Barlow's, Inc., 436 U.S. at 312-

(continued...)

Over the years, this Court has found it necessary to carve out a number of exceptions to traditional Fourth Amendment requirements in "'exceptional circumstances . . . [where] special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable.'" O'Connor v. Ortega, 107 S.Ct. at 1500 (citation omitted). However, the burden is always upon the government to justify such exceptions, and they must be "'jealously and carefully drawn.'" Arkansas v. Sanders, 442 U.S. 753, 759-760 (1979); Chimel v. California, 395 U.S. 752, 762 (1969). This is so because, as this

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8/ (...continued)
313; Michigan v. Tyler, 436 U.S. 499, 506 (1978) ("there is no diminution in a person's reasonable expectation of privacy nor in the protection of the Fourth Amendment simply because the official conducting the search" is acting for civil purposes rather than searching for evidence of a crime); Camara v. Municipal Court, 387 U.S. 530.

Court has recognized, "even a limited search of the person is a substantial invasion of privacy." New Jersey v. T.L.O., 469 U.S. at 337; Terry v. Ohio, 392 U.S. 1, 24-25 (1968).

These fundamental constitutional principles cannot be reconciled with the Third Circuit's ruling that, because police work "is probably the most highly regulated . . . of any industry in New Jersey . . ." (121a), the pervasively regulated industry exception to the Fourth Amendment authorizes random urine drug testing of all police officers without probable cause or reasonable suspicion, and without prior issuance of a warrant.

In holding police officers immune from Fourth Amendment guarantees because of the pervasively regulated nature of government employment, the lower court has effectively

vitiated Fourth Amendment protection for public employees. Under the lower court's rationale, virtually all public employees will be subject to warrantless searches and seizures without probable cause or reasonable suspicion due simply to the fact of governmental employment. Such an approach is supported by neither precedent nor policy, and conflicts both with decisions of this Court and rulings from other courts of appeals to consider the issue.

In predicating its decision upon the pervasively regulated industry exception to the Fourth Amendment, the lower court purported to rely upon precedent from this Court in which warrantless searches have been justified for "pervasively regulated business[es]," United States v. Biswell, 406 U.S. 311, 316 (1972)(firearms), and for "closely regulated" industries "long

subject to close supervision and inspection." Colonnade Catering Corp. v. United States, 397 U.S. 72, 74 (1970)(liquor); see also, Donovan v. Dewey, 452 U.S. 594 (1981)(mines); New York v. Burger, 107 S.Ct. 2636 (1987)(automobile junkyards). However, as this Court has admonished, "[t]hese cases are exceptions . . . represent[ing] responses to relatively unique circumstances." Marshall v. Barlow's, Inc., 436 U.S. at 313.

The pervasively regulated industry exception is predicated upon the rationale that "[c]ertain industries have such a history of government oversight that no reasonable expectation of privacy, . . . could exist for a proprietor over the stock of such an enterprise" and that "when an entrepreneur embarks upon such a business, he has voluntarily chosen to subject

himself to a full arsenal of governmental regulation." Marshall v. Barlow's, Inc., 436 U.S. at 313. "Because the owner or operator of commercial premises in a 'closely regulated' industry has a reduced expectation of privacy, the warrant and probable-cause requirements, which fulfill the traditional Fourth Amendment standard of reasonableness for a government search . . . have lessened application in this context." New York v. Burger, 107 S.Ct. 2643 (citation omitted).

Here by contrast, it cannot be said that police officers are members of a highly regulated business or industry. Indeed, simply to use the term "police industry," as suggested by the lower court, underscores the inadequacy of the analysis. Police officers are not engaged in a "commercial enterprise," Donovan v. Dewey, 452

U.S. at 599, nor have they been subject to a "comprehensive and defined" regulatory scheme in which drug testing is a "necessary component." 452 U.S. at 600.

Moreover, the only regulations imposed upon Washington Township police officers and the only regulations relied upon by the lower court, (106a-121a), are general state regulations applicable to virtually all governmental employees and local regulations which apply to police officers qua employees. Such regulations are not part of an industry with a long tradition of pervasive regulations, but stem directly from the officers' status as employees of Washington Township. The mere fact of government supervision of its employees and regulations relating thereto, cannot be equated with a pervasively regulated industry, automatically justifying warrant-

less searches without probable cause or individualized suspicion.[9/] Indeed, just the opposite is true. When government itself is the employer, there is simply no justification for expanding a Fourth Amendment exception premised on the need to permit close supervision of certain critical industries owned and controlled by the private sector.

Were a police officer subject to unfettered governmental intrusion merely by reporting to work, the protections guaranteed by the Fourth Amendment would be seriously circumscribed. O'Connor v. Ortega, supra. Precedent from this Court has never supported such a sweeping propo-

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9/ Cf. Delaware v. Prouse, 440 U.S. 648, 662 (1970)("An individual operating or traveling in an automobile does not lose all reasonable expectation of privacy simply because the automobile and its use are subject to government regulation").

sition and every other court which has considered such a claim has explicitly stated that police officers and fire fighters do not work in a highly regulated industry. See e.g., O'Connor v. Ortega; Penny v. Kennedy, 846 F.2d 1563 (6th Cir. 1988); Guiney v. Roache, 686 F.Supp. 956, 963 (D. Mass. 1988); Capua v. City of Plainfield, 643 F.Supp. 1507, 1518-1519 (D. N.J. 1986); Fraternal Order of Police v. Newark, 524 A.2d 430, 434-35 (N.J.App.Div. 1987); Caruso v. Ward, 506 N.Y.S.2d 789, 798 (N.Y.Sup.Ct. 1986), aff'd, 520 N.Y.S.2d 551 (N.Y.App.Div. 1987).

Moreover, the courts have never held that pervasive regulation and licensing by one governmental agency opens the door to warrantless searches by other entities. Thus, in holding that the police industry is highly regulated, the lower court based

its determination upon the fact that "the government and discipline of [Washington Township's] police force is subject to 'general law' which includes an extensive body of state statutory law." (106a). Such general statutory provisions not only apply to virtually all governmental employees, but the fact that the Washington Township police may be subject to regulation by various statutes and regulatory boards such as the Civil Service Commission, New Jersey Department of Labor, or the Equal Employment Opportunity Commission, does not permit the Township to ride on the coattails of other regulatory agencies to establish "a long tradition" of pervasive regulation, Marshall v. Barlow's, Inc., 436 U.S. at 313, in support of its intrusion into workers' privacy.

Furthermore, warrantless, without cause searches, "even in the context of a pervasively regulated business, will be deemed to be reasonable only so long as three criteria are met." New York v. Burger, 107 S.Ct. at 2643-2644. As this Court recently reiterated in Burger:

> [f]irst, there must be a 'substantial' government interest that informs the regulatory scheme pursuant to which the inspection is made . . . Second, the warrantless inspection must be 'necessary to further [the] regulatory scheme . . . .' Finally, 'the statute's inspection program in terms of the certainty and regularity of its application, [must] provid[e] a constitutionally adequate substitute for a warrant.'

107 S.Ct. at 2644.

The lower court's opinion simply ignores this test, beginning and ending with the observation that "the police industry is probably the most highly regulated . . . of any industry in New

Jersey." (121a). Had the Third Circuit followed this Court's analysis in Burger, the unconstitutionality of the Township's warrantless and without cause search of its employees would have been clear.

First, there is simply nothing in the factual record of this case demonstrating a substantial governmental interest in the Township's drug testing plan (other than the interest which any employer has regarding its employees). The plan was proposed without a scintilla of evidence that drug abuse is a problem among the Township's police force, or that a single member of the police force, other municipal employee, or even resident of the Township, has ever been involved in illegal drug use.

Second, the Township has offered no evidence, and the lower court points to none, which demonstrates that warrantless

and without cause searches are "necessary to further [the] regulatory scheme." Dewey v. Donovan, 452 U.S. at 600. This omission is fatal. In the prior cases cited by the Third Circuit, this Court has authorized warrantless searches without individualized suspicion only when it is "doubtful that any other canvassing technique would achieve acceptable results." Camara v. Municipal Court, 387 U.S. at 537; United States v. Biswell, 406 U.S. at 316. In this case, there is not a shred of record evidence that the Township even considered other ways of achieving its stated goal without intruding so deeply into the personal privacy of its employees.10/

10/ Numerous courts and commentators have recognized that urine tests do not measure intoxication, impairment or on-the-job drug use. Courts and commentators have also recognized that there are readily available alternatives to determine impaired job performance. See e.g., (continued...)

Finally, the Township's random drug testing program does not provide a "constitutionally adequate substitute for a warrant." Donovan v. Dewey, 452 U.S. at 603. Rather, the Township's testing program is completely random, leaving the

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10/ (...continued)
Report of the Maine Commission to Examine Chemical Testing of Employees, 20 (Dec. 31, 1986)(citations omitted); United States House of Representatives, Subcommittee on Civil Service of the Committee on the Post Office and Civil Service, Civil Service Staff Report, Drug Testing in the Federal Government at 12 (1986); Dubowski, "Drug-Use Testing: Scientific Perspectives," 11 NOVA L. Rev. 415, 526-528 (1987); Sonnenstuhl, et al., Employee Assistance and Drug Testing, 11 NOVA L. Rev. 709, 721 (1987); Railway Labor Executives' Ass'n v. Burnley, 839 F.2d 575, 588-89 (9th Cir. 1988)(and citations therein), cert. granted, 108 S.Ct. 2033 (1988); Guiney v. Roache, 686 F.Supp. at 962; NFFE v. Carlucci, 680 F.Supp. 416, 428-430 (D.D.C. 1988)(and citations therein); Taylor v. O'Grady, 669 F.Supp. 1422, 1431-1433 (N.D.Ill. 1987); Anable v. Ford, 653 F.Supp. 22, 39 (W.D. Ark. 1983). As the National Institute of Drug Abuse has acknowledged, a positive drug test result "cannot be used to prove intoxication or impaired performance" at the time of the test. NIDA, Employee Drug Screening: Detection of Drug Use By Urinalysis.

scope and frequency of such tests and the identity of the victimized employees to "the discretion of the inspecting officers." New York v. Burger, 107 S.Ct. at 2644. In addition, the program leaves complete discretion to the laboratory technician to require direct observation of each tested employee. Such a random program undermines the very values which the Fourth Amendment was adopted to protect.

"The basic purposes of this Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by government officials." Camara v. Municipal Court, 387 U.S. at 528. This "basic purpose" cannot be accomplished if privacy interests are subject to invasion "at the unfettered discretion of officers in the field." Brown v. Texas, 443 U.S.

48, 51 (1979). To the contrary, this "unfettered discretion" is "precisely the evil" which this Court has condemned in a variety of contexts, Delaware v. Prouse, 440 U.S. 618 (1979); Marshall v. Barlow's, Inc., supra; Almeida-Sanchez v. United States, 413 U.S. 266, 270 (1973).

Like other well publicized national concerns of the past, the heightened public attention to the law enforcement problems created by illegal drug trafficking has engendered powerful pressures to weaken the constitutional protections long afforded to all citizens. However, as this Court has often reminded us, "[t]he needs of law enforcement stand in constant tension with the Constitution's protections of the individual against certain exercises of official power . . . It is precisely the predictability of these pressures that

counsels a resolute loyalty to constitutional safeguards." Almeida-Sanchez v. United States, 413 U.S. at 273-274.

The Third Circuit's opinion in this case constitutes an unprecedented extension of the pervasively regulated industry exception to the Fourth Amendment beyond anything ever envisioned by any prior decision of this Court. Absent review by this Court, the lower court's decision will create an exception that effectively swallows the Fourth Amendment previously extended to public employees.

II. THE THIRD CIRCUIT ERRED IN HOLDING THAT THE PERVASIVELY REGULATED INDUSTRY EXCEPTION TO THE WARRANT AND PROBABLE CAUSE REQUIREMENT OF THE FOURTH AMENDMENT APPLIES TO SEARCHES OF PEOPLE, AS OPPOSED TO SEARCHES OF PROPERTY OR INVENTORY OF THE REGULATED BUSINESS, SUCH THAT POLICE OFFICERS ARE SUBJECT TO WARRANTLESS SEARCHES WITHOUT PROBABLE CAUSE OR INDIVIDUALIZED SUSPICION

Not only did the lower court err by concluding that a police department is a pervasively regulated industry, it compounded its error by applying this narrow Fourth Amendment exception to the intimate search of an employee's body. This Court, by contrast, has never applied the pervasively regulated industry rule to anything other than the search of commercial inventory or property. See e.g., New York v. Burger, 107 S.Ct. at 2642 (no reasonable expectation of privacy could exist for a proprietor over the stock of such an enterprise (emphasis added)); Donovan v.

Dewey, 452 U.S. at 598-599 (diminished expectation of privacy in warrantless inspections of commercial property); Marshall v. Barlow's, Inc., 435 U.S. at 313; Balelo v. Baldridge, 724 F.2d 753, 767 (9th Cir.)(en banc), cert. denied, 467 U.S. 1252 (1984)(upheld search of fishing vessels for violation of Marine Mammal Protection Act, but noting that regulation does not authorize a search of personal effects or living quarters of the captains and their crews).

The distinction, moreover, is a constitutionally significant one. As this Court has consistently observed, "[a]n expectation of privacy in commercial premises . . . is different from, and indeed less than a similar expectation in an individual's home." New York v. Burger, 107 S.Ct. at 2642 (1987).

> The greater latitude to conduct warrantless inspections of commercial property reflects the fact that the expectation of privacy that the owner of commercial property enjoys in such property differs significantly from the sanctity accorded an individual's home, and that this privacy interest may, in certain circumstances, be adequately protected by regulatory schemes authorizing warrantless inspections.

Donovan v. Dewey, 452 U.S. at 598-599.

If anything, the search of an individual is even more invasive than the search of a home. Indeed, it can hardly be denied that compelling an individual to urinate on government command, at a time and place designated by the government, under government monitoring, involves a significant "intrusion upon the individual's dignity interests in personal privacy and bodily integrity." Winston v. Lee, 470 U.S. at 761. Thus, even courts which have upheld urine drug testing have noted:

> There are few activities in our society more personal or private than the passing of urine. Most people describe it by euphemism if they talk about it at all. It is a function traditionally performed without public observation; indeed, its performance in public is generally prohibited by law as well as by social custom.

National Treasury Employees' Union v. von Raab, 816 F.2d 170, 175 (5th Cir. 1987), cert. granted, 108 S.Ct. 1072 (1988).

In addition, requiring an employee to produce urine for chemical analysis discloses substantial personal information wholly unrelated to employment.

> Urine testing may disclose not only the presence of drug traces but much additional personal information about an employee -- whether the employee is under treatment for depression or epilepsy, suffering from diabetes, or, in the case of a female, pregnant. Even tests limited to the detection of controlled substances will reveal the use of medications prescribed for relief of pain or other medical symptoms.

Id.

Further, the Township's drug testing plan "casually sweeps up the innocent with the guilty," Capua v. City of Plainfield, 643 F.Supp. at 1517, by its very randomness. Such dragnet procedures inevitably "generat[e] concern or even fright on the part of those subject to the test." Delaware v. Prouse, 440 U.S. at 657. As this Court has emphasized, the Fourth Amendment's prohibition on unreasonable searches and seizures "limit[s the government's] use of unnecessarily frightening or offensive methods of surveillance and investigation." United States v. Ortiz, 422 U.S. 891, 894 (1975).

Because of the intrusive nature of random drug testing, every court that has considered the Fourth Amendment implications of urine testing has concluded that

requiring public employees to produce a urine sample for chemical analysis violates reasonable expectations of privacy and therefore constitutes a "search" of the person within the meaning of the Fourth Amendment.11/

It is one thing to recognize, as this Court has, the reduced expectation of privacy of a businessperson over the stock of

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11/ See e.g., Railway Labor Executives Association v. Burnley, 839 F.2d at 580; Jones v. McKenzie, 833 F.2d 335, 338 (D.C.Cir. 1987), petition for cert. filed, 56 U.S.L.W. 3739 (April 15, 1988); Everett v. Napper, 833 F.2d 1507, 1511 (11th Cir. 1987); National Federation of Federal Employees v. Weinberger, 818 F.2d 935, 942 (D.C. Cir. 1987); National Treasury Employees' Union v. von Raab, 816 F.2d at 176; McDonell v. Hunter, 809 F.2d 1302, 1307 (8th Cir. 1987); Division 241 Amalgamated Transit Union v. Suscy, 538 F.2d 1264, 1266-1267 (7th Cir.), cert. denied, 429 U.S. 1029 (1976); Guiney v. Roache, 686 F. Supp. at 958; Taylor v. O'Grady, 669 F.Supp. 1422, 1434-1435 (N.D. Ill. 1987); Feliciano v. City of Cleveland, 661 F.Supp. 578, 586 (N.D. Ohio 1987); American Federation of Government Employees v. Weinberger, 651 F.Supp. 726, 732-733 (S.D.Ga. 1986); Capua v. City of Plainfield, 643 F.Supp. 1507, 1513 (D.N.J. 1986).

a commercial enterprise subject to intensive regulation as justification for warrantless, without cause searches. It is quite another to do as the lower court has done here and apply that reasoning to the high degree of privacy traditionally afforded to one's person and bodily functions.

As this Court has explained, the raison d'etre for the administrative search exception and the justification for the relaxation of Fourth Amendment protections is that "the inspections are [not] personal in nature . . . they involve a relatively limited invasion of the urban citizen's privacy." Camara v. Municipal Court, 387 U.S. at 537.

Correspondingly, this Court has repeatedly cautioned that "[t]he clear import of our cases is that the closely

regulated industry of the type involved in Colonnade and Biswell is the exception." Marshall v. Barlow's, Inc., 436 U.S. at 313-314. The danger of the Third Circuit's opinion is that it turns this unique exception into the norm. Plenary review by this Court is therefore appropriate.

III. THE THIRD CIRCUIT'S RELIANCE UPON THE PERVASIVELY REGULATED INDUSTRY EXCEPTION TO THE WARRANT AND PROBABLE CAUSE REQUIREMENT OF THE FOURTH AMENDMENT AS JUSTIFICATION FOR WARRANTLESS SEARCHES OF PUBLIC EMPLOYEES WITHOUT PROBABLE CAUSE OR INDIVIDUALIZED SUSPICION, CONTRAVENES THIS COURT'S RULING IN O'CONNOR v. ORTEGA, AND CONFLICTS WITH DECISIONS FROM OTHER COURTS OF APPEALS

In subjecting police officers to warrantless searches without probable cause or reasonable suspicion because of the pervasively regulated nature of their government employment, the lower court has adopted a standard for the Fourth Amendment protection of public employees that is

completely at odds with this Court's recent decision in O'Connor v. Ortega, 107 S.Ct. 1492 (1987).

In O'Connor, this Court emphatically "reject[ed] the contention made by the Solicitor General . . . that public employees can never have a reasonable expectation of privacy in their place of work." 107 S.Ct. at 1498. Rather, the Court held that "[i]ndividuals do not lose Fourth Amendment rights merely because they work for the government instead of a private employer." Id. Due to the limited nature of the search at issue in O'Connor, the plurality opinion stressed that the constitutionality of a search of a public employee should be measured by its "reasonableness" under all of the circumstances. 107 S.Ct. at

1502.[12/] Under such a test, a public employer must show that a search was both "'justified at its inception'" and reasonably related in scope to the objectives of the search. 107 S.Ct. 1503. Although the O'Connor court adopted a less stringent standard than probable cause, no member of the Court suggested that searches with no cause or suspicion would pass muster.

Under the lower court's decision in this case, the careful balancing test outlined by this Court in O'Connor is completely vitiated by application of the

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[12/] The employer's office search in O'Connor represented a "'relatively limited invasion' of employee privacy" since offices are supplied by the government solely for work related reasons and an "employee may avoid exposing personal belongings at work simply by leaving them at home." 107 S.Ct. 1502. Urine searches on the other hand, are highly personal searches, not inspection of property provided by the government for a limited purpose, and the employee is powerless to render them less personal or degrading, or to avoid them. See Jones v. McKenzie, 833 F.2d at 339.

pervasively regulated industry exception to the Fourth Amendment. The lower court's opinion in this case simply cannot be squared with the O'Connor analysis, and does not comport with the Fourth Amendment constitutional protection which the O'Connor court sought to accord public employees.

Further, the lower court's application of the pervasively regulated industry exception to public employees directly conflicts with decisions from other courts of appeals. For example, in Railway Labor Executives' Ass'n v. Burnley, 839 F.2d at 584-585, the Ninth Circuit concluded that "the administrative search inspection standard, which allows warrantless searches of the premises of pervasively regulated industries, is not applicable to searches of persons even when they are employed in

those industries, unless the employees are the principal concern of the industry regulation." 839 F.2d at 585.13/

Adjudication by this Court is necessary to resolve the conflict in decisions of the various courts of appeals on this constitutional question. Although the search in this case arose in the context of a random drug test, the larger issue involves the applicability and constitu-

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13/ Indeed, as the lower court itself recognized (123a, n.6), numerous other courts have emphatically rejected the Third Circuit's reasoning in Shoemaker and its progeny, and criticized reliance upon the pervasively regulated industry exception as justification for random drug testing. See e.g., Guiney v. Roache, 686 F.Supp. at 963; American Federation of Government Employees v. Weinberger, 651 F.Supp. at 734-735; Capua v. City of Plainfield, 643 F.Supp. at 1518-1519; Fraternal Order of Police v. Newark, 524 A.2d at 434-35; Caruso v. Ward, 506 N.Y.S.2d at 798. A contrary result was recently reached by the Eighth Circuit in Rushton v. Nebraska Public Power District, 844 F.2d 562, 566-567 (8th Cir. 1988), which applied the Third Circuit's analysis and the pervasively regulated business exception to justify a random drug test of a nuclear power plant employee.

tionality of the pervasively regulated industry exception to justify the warrantless search of municipal employees without probable cause or individual suspicion.

The anticipated decisions by this Court Railway Labor Executives Association v. Burnley, No. 87-1555, cert. granted, 108 S.Ct. 2033 (1988), and National Treasury Employees Union v. von Raab, No. 86-1879, cert. granted, 108 S.Ct. 1072 (1988), simply will not resolve the constitutional dilemma raised by, and the conflicting decisions engendered by, the Third Circuit's unprecedented application of the

pervasively regulated industry exception to the Fourth Amendment.[14/]

14/ At issue before this Court in Burnley is the constitutionality of Federal Railroad Administration regulations mandating blood and urine tests of railroad workers involved in certain train accidents. At issue in von Raab is the constitutionality of the Customs Service's drug screening program which requires certain selected employees, as a condition of promotion, to undergo a urine drug screen, even though the tests are conducted without probable cause or reasonable suspicion and the Customs Service has conceded that its work force is largely drug free. In neither case is the pervasively regulated industry search exception at issue. Indeed, in both cases the government has eschewed reliance on that exception as justification for its testing.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be granted. Alternatively, this petition should be held pending final decisions in Burnley, No. 87-1555, and von Raab, No. 86-1879.

Respectfully submitted,

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Dated: October 26, 1988

APPENDIX

TOWNSHIP OF WASHINGTON GLOUCESTER COUNTY
MUNICIPAL BUILDING, P.O. BOX 2206,
TURNERSVILLE, NJ 08012
TELEPHONE 609-589-0575

OFFICE OF THE MAYOR

November 13, 1986

Dear Employee,

On August 4, 1986 President Ronald Reagan called on every level of government to join a national effort to make drug use an unacceptable behavior and to develop plans to provide a drug free work place. The President said, "employees who use illegal drugs, on or off duty, tend to be less productive, less reliable, and prone to greater absenteeism than their fellow employees who do not use illegal drugs; President Reagan went on to say that, the use of illegal drugs undermines public confidence and makes it more difficult for other employees to perform their jobs effectively. The use of illegal drugs, on or off duty, can pose serious health and safety threat to members of the public and to other employees."

On August 5, 1986 I announced that Washington Township would begin a mandatory drug testing program for <u>all</u> municipal employees, myself included.

As you know, there has been considerable dialogue, opposition, rumor and just plain bad information about the drug testing program in Washington Township. This was due, in part, to the fact that the

actual plan and process for testing has not yet been formulated. However, the plan is now complete and it is being distributed to each employee.

I believe the attached plan represents a comprehensive approach to mandatory drug testing and I encourage each of you to thoroughly review it with your families and fellow workers. I'm certain that many of you will have questions regarding this plan and in anticipation of your questions we will be scheduling departmental meetings over the next sixty days to review the elements of the plan with you.

I firmly believe that as employees of the taxpayers we have an obligation to show the way toward achieving a drug free work place. This can be done by the successful implementation of a program designed to offer drug users a helping hand and, at the same time, demonstrate to drug users and potential drug users that drugs will not be tolerated in the work place.

In closing, I ask for your understanding cooperation, and willing participation. Together we can show the residents of Washington Township that their employees are doing their fair share to combat the use of drugs.

Sincerely,

John W. Robertson
Mayor

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

POLICEMEN'S BENEVOLENT ASSOCIATION OF NEW JERSEY, LOCAL 318 and EDMUND GIORDANO, Individually and as President of the Policeman's Benevolent Association of New Jersey, Local 318,	:	Civil Action No. 86-3525
Plaintiffs,	:	O P I N I O N
v.	:	
TOWNSHIP OF WASHINGTON (Gloucester County) a municipal corporation under the laws of New Jersey, and JOHN ROBERTSON, Mayor,	:	
Defendants.	:	

Appearances:

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Moorestown, NJ 08057
(Attorney for Plaintiffs)

Joseph A. Alacqua, Esquire
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Turnersville, NJ 08012
(Attorney for Defendants)

RODRIGUEZ, District Judge

FACTS AND PROCEDURAL HISTORY

This case was brought before the court pursuant to 42 U.S.C. §1983. The plaintiffs claim that the constitutional rights of Washington Township's police officers, whom plaintiffs represent, will be violated if the Township's proposed drug-testing plan for municipal employees is put into effect.

The issues in this matter represent a juxtaposition of the two vital societal concerns: The need to ensure that our public servants, in this case police officers, are free from the modern scourge of illegal drug abuse; versus the right of the individual to be protected from unreasonable searches aimed at detecting evidence of such abuse. This opinion

presents the court with an opportunity to delineate the constitutional boundaries of these potentially conflicting societal interests.

On August 4, 1986, President Ronald Reagan called upon all levels of government to develop plans to ensure drug-free workplaces in our nation. On August 5, 198, the Mayor of Washington Township, John W. Robertson, Jr., inspired at least in part by the President's call, issued a memorandum directing that all employees of the Township would be subject to mandatory drug testing. There were no guidelines issues with respect to the proposed testing at that time.

On September 12, 1986, the Policemen's Benevolent Association of New Jersey, Local 318 and its president, Edmund Giordano,

filed suit on behalf of the police officers of Washington Township. The Township, Mayor Robertson and the Township Council were named as defendants. The plaintiffs asked the court to declare the planned drug testing unconstitutional and to enjoin the Township from undertaking such testing with respect to police officers. The plaintiffs also sought temporary restraints against the defendants while the matter was under review.

The court initially granted temporary restraints and ordered the defendants to appear and show cause why the preliminary injunction should not be granted to the plaintiffs. The parties appeared in court on September 19, 1986. At that time, the Township indicated that no testing of police officers had taken place and that

none would take place until guidelines were formulated and the court had an opportunity to review those guidelines. Based on those representations, plaintiffs' application for a preliminary injunction was denied. The temporary restraints were dissolved on October 8, 1986.

On October 6, 1986, the defendants answered the plaintiffs' allegations and counterclaimed for attorney's fees pursuant to 42 U.S.C. §1988.

Pretrial discovery was conducted under the supervision of Judge Jerome B. Simandle. On February 25, 1987 the defendants submitted the "Revised Employee Drug Testing Program of the Township of Washington," (Plan) which is the plan under review here. The parties have since indicated that no genuine issue of material

fact remains to be decided and that this dispute can be resolved by motion. The case is presently before us on cross-motions for summary judgment on the issue of whether certain aspects of the defendant's proposed drug testing plan should be permanently enjoined.

The plaintiffs have stipulated that they are only challenging the constitutionality of the following aspects of the proposed plan: those aspects calling for the random testing of police officers; those aspects which might authorize the mass-testing of the entire police force; and those aspects which would permit testing as part of pretextual physical examinations which are not bona fide medical examinations given in the ordinary

course of business and as a matter of the Township's policy for its police officers.

The plaintiffs have also stipulated to dismiss the Township Council as a defendant. In return, the defendant Township Council has withdrawn the counterclaims in which it sought attorney's fees.

THE PLAN

The stated purpose of the proposed plan is "to establish uniform policies and procedures to govern the administration of a screening process to test and control unauthorized use of illicit drugs among all sworn and civilian personnel of the Township of Washington." Plan, section 1, pg. 1. The introductory section indicates that the policy "takes cognizance of the rights inherent in each individual of the Township under the Constitution of the

United States of America and the State of New Jersey." Plan, section 2, pg. 1. Of course, it is the purpose of this opinion to determine whether or not the policy embodies a sufficient cognizance of constitutional rights.

The plan proposed by Washington Township would permit the defendant to initiate drug testing of its employees in a variety of ways. There are two "base methods" listed for the detection of illegal drug use by Township employees. The first is "[t]esting of those individual employees where facts are sufficient to constitute reasonable suspicion ..." of illegal drug use. The second is by way of a "universal random urinalysis procedure." Plan, section 3, pg. 2. In addition to these "base methods," the policy also

states that all municipal employees will be required to have annual physical examinations which shall include a urinalysis drug test. There is a reservation of the right to require additional "regularly scheduled and announced" medical examinations of employees in certain municipal departments. Plan, section 4, pg. 3. The plaintiffs believe that this reservation would give the Township the power to schedule drug tests in addition to those conducted as part of the annual "medical examination." Finally, the policy requires all municipal job applicants to sign consent forms in which they agree to submit a urine sample for drug testing. An applicant's refusal to provide such a sample or the detection of drugs in a sample will result in the rejection of the employment application.

Random selection of employees to be tested would be accomplished by a computer programmed by an independent contractor. The selected subject would be notified of the impending drug test "just prior to transport to the testing location." Plan, section 8, pg. 5. The employees would also be informed at that time of the specific drugs to be tested for.

The following procedure would apparently apply to all drug testing, whether initiated by random selection or otherwise: Testing will take place in a "clean and sanitary location" equipped with washing facilities. Plan, section 10, pg. 7. The selected employee must complete a medical questionnaire which clearly describes "all drugs, both prescription and non-prescrip-

tion, ingested during the past 30 days." Plan, section 8, pg. 5.

The employee must thoroughly wash hi or her hands and fingernails and "deliver the urine sample under the direction of the medical or laboratory technician." Id. The employee must submit a required minimum amount of urine in an approved container. The urination would take place in "private," unless there is a reasonable suspicion that the subject will tamper with the sample in some way. Plan, section 12, pg. 8. However, the urination will in any event take place under the general supervision of [a] medical laboratory technician." The laboratory technician will supervise "all aspects of obtaining, marking and packaging of individual urine samples...." Plan, section 10, pg. 6.

"At all stages of the urine-sampling procedure the employee will be expected to follow each instruction of the testing supervision." Plan, section 8, pg. 5. The employee will be assigned a number which will correspond to a number on the sampling container. This process is designed to assure anonymity. The employee must also sign documentation verifying that the number on the sample corresponds to the number they have been assigned.

The Township is to specify which specific illegal substances it wishes to test for in each case. The testing laboratory shall be responsible for maintaining a proper chain-of-custody of each sample. Each sample would undergo two different tests. The plan tentatively indicates that the first test shall employ

a thin-layer chromatography process. The second test shall employ either "enzyme immunoassay, gas liquid chromatography, [or] mass spectrometry." Plan, section 13, pg. 8. The testing laboratory would also preserve an aliquot sample of the urine which the subject employee may use to conduct a confirmatory test at the same laboratory, under the supervision of experts chosen by the employee.

Drug testing would not be conducted for purposes of criminal prosecution. Employees testing positive for drugs would be referred to an Employee Assistance Program for "assessment, counseling, and referral for treatment or rehabilitation as appropriate." Plan, section 17, pg. 10.

However, the Township reserves the right to dismiss or discipline anyone found

to be using drugs. The only drug users who may not be disciplined or fired are those employees who come forward and volunteer to be drug tested during the sixty day period prior to the implementation of the Township's mandatory testing program. To avoid termination or other disciplinary action, such persons must also volunteer the fact that they are illegal drug users, obtain help through the Employee Assistance Program (EAP), and remain drug-free thereafter. Any employee who refuses rehabilitation and uses illegal drugs a second time will be terminated.

The proposed plan includes an education program which would, among other things, educate employees about the extent of the drug problem facing society; the programs in effect to combat this problem;

the dangers of drugs; and the signs of drug abuse which can be detected in fellow employees. Supervisory personnel will also receive training so that they will be able to determine when a reasonable suspicion exists that an employee is using drugs.

Employees will be notified sixty days in advance that the drug testing program is about to go into effect. During that period employees are encouraged to voluntarily come forward if they are using illegal drugs. All job applicants would be informed that drug testing is a condition of employment.

The proposed plan has a severability clause which states that "if any of its provisions shall be held unconstitutional or otherwise invalid by any court of competent jurisdiction, the decision of

such court shall not affect or impair any of the remaining provisions." Plan, section 16, pg. 10.

OPPOSING ARGUMENTS

The plaintiffs argue that taking urine samples for drug testing purposes constitutes a search and seizure under the Fourth Amendment. They cite a list of cases which agree with that assertion. Since a variety of private medical facts about a person can be detected in their urine, the plaintiffs assert that an individual has a reasonable expectation of privacy with respect to its discharge and the detection of the private information therein.

The plaintiffs argue that the Fourth Amendment requires Washington Township to obtain a warrant based on full probable

cause in order to institute a urinalysis drug search of its police officers. However, the plaintiffs admit that the warrant requirement of the Fourth Amendment is not "inviolate." Plaintiff's brief at 7. Therefore, they argue in the alternative that at least a reasonable suspicion of illegal drug use by an officer must exist before the officer may be ordered to submit to a urinalysis.

The plaintiffs believe that the reasonable suspicion standard is justified by a balancing of the interests at stake here. They rely on the fact that Washington Township has not identified an existing drug problem among its police officers. The plaintiffs do not dispute the Township's need to ensure that police officers do not use illegal drugs.

However, they argue that mandatory urine testing in the absence of even a reasonable suspicion is an excessively intrusive means to achieve that end. While they concede that a police officer's expectation of privacy may be diminished somewhat, they insist that it is not so diminished as to permit the types of tests, absent reasonable suspicion, which the Township is seeking to conduct here.

The plaintiffs especially oppose the Township's attempt to drug test police officers on a random basis. They argue that randomness provides no standard at all to measure when a given search is reasonable. They argue that random testing has the same ultimate effect as the mass testing of all police officers. They observe that courts have disallowed the

mass testing of municipal employees under circumstances similar to those presented here.

Even though the proposed tests are not aimed at gathering evidence for criminal prosecution, the plaintiffs point out that an officer's career will hang in the balance pending the test outcome and that the result could be incorrectly reported for a variety of reasons.

The plaintiffs contend that the medical examinations called for the drug testing policy are not bona fide medical examinations but are a mere subterfuge to conduct urinalysis drug tests under another label. They believe that the medical examination provisions are a "distractor" intended to permit the Township to urine test at its discretion. Plaintiffs' brief

at 21. They point out that no medical guidelines, other than a drug-urine test, are established as a requirement of fitness for duty by police officers.

The defendants respond by arguing that the intrusion engendered by a mandatory urinalysis is minimal. They believe that a police officer has no reasonable expectation of privacy in opposition to the proposed tests, since a police officer enjoys limited privacy rights on the job and because there can be no reasonable expectation of privacy in the fact that an individual is using illegal drugs.

The defendants believe that random testing of police officers is the most efficient and effective way to ensure a drug-free police force. They concede that prior attempts to mass test municipal

employees have been struck down as unreasonable by the courts. However, the defendants believe that their proposed drug testing plan has recognized and overcome the fatal defects which were present in those programs.

For example, the defendants believe that their program is reasonable because it would permit most officers to urinate in private, because it is governed by a detailed set of written guidelines, and because the information obtained would be utilized for disciplinary but not for criminal purposes.

The defendants do not claim that a drug problem among the Township's police officers has been documented. They assert that their program is fully justified as a preventive effort and rely on statistics

which indicate that a serious drug problem exists in society as a whole. These statistics, they maintain, create a reasonable concern by Township officials that employees are using or may in the future use illegal drugs.

To support their effort, the defendants rely on previous cases which have upheld the mandatory urine testing of jockeys, nuclear plant employees, flight service specialists and certain prison guards. Finally, the defendants maintain that mandatory urine testing has been "unanimously" upheld by recent federal circuit court decisions.

A MANDATORY URINALYSIS CONSTITUTES A SEARCH

The Employee Drug Testing Program of Washington Township requires that municipal employees, including police officers,

submit to urine testing aimed at detecting the presence of illegal drugs. The use of such mandatory drug testing procedures and the review of their legality in the courts are relatively modern phenomena. Nonetheless, among those courts considering the question, a consensus has developed that a mandatory urinalysis constitutes a search within the meaning of the Fourth Amendment. McDonell v. Hunter, 809 F.2d 1302, 1307 (8th Cir. 1987); Shoemaker v. Handel, 795 F.2d 1136, 1141 (3d Cir.), cert. denied 107 U.S. 577 (1986) (implicit finding that mandatory urinalysis constitutes a search); Feliciano v. City of Cleveland, 661 F.Supp. 578, 584 (N.D. Ohio 1987); Capua v. City of Plainfield, 643 F.Supp. 1507, 1513 (D.N.J. 1986); Jones v. McKenzie, 628 F.Supp. 1500, 1508 (D.D.C. 1986); Lovvorn v. City of

Chattanooga, 647 F.Supp. 875, 879 (E.D. Tenn. 19860; Allen v. City of Marietta, 601 F.Supp. 482, 489 (N.D. Ga. 1985); Storms v. Coughlin, 600 F.Supp. 1214, 1217 (S.D.N.Y. 1984). Cf. Fraternal Order of Police v. City of Newark, 216 N.J. Super. 461, 466 (App. Div. 1987) (construing nearly identical provision of New Jersey Constitution).

While it is true that all individuals, by necessity, routinely dispense urine from their bodies, they usually do so in conditions of privacy where the bodily fluids are quickly disposed of and are not retrievable by others for testing purposes. "One does not reasonably expect to discharge urine under circumstances making it available to others to collect and analyze in order to discover the personal physiolo-

gical secrets it holds." Capua v. City of Plainfield, 643 F.Supp. at 1513 (quoting McDonell v. Hunter, 612 F.Supp. 1122, 1127 (D. Iowa 1985)). The mandatory taking and testing of urine samples from Washington Township's police officers would therefore constitute a search.

Since the mandatory urine testing proposed by the defendant would constitute a search within the meaning of the Fourth Amendment, this court must determine whether the planned searches are constitutionally permissible. This entails an examination of the provisions of the Fourth Amendment in order to ascertain: whether a warrant must be acquired before undertaking searches; whether probable cause or reasonable suspicion is needed to justify the searches; and whether the searches will

be "reasonable," as required by the amendment.

The Fourth Amendment of the United States Constitution states that:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fourth Amendment applies to the states through the Fourteenth Amendment. Wolf v. Colorado, 338 U.S. 25, 27-28 (1949).

"[T]he most basic constitutional rule in this area is that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment -- subject only to a few specifically es-

tablished and well-delineated exceptions.'" Collidge v. New Hampshire, 403 U.S. 443, reh'g denied, 404 U.S. 874 (1971) (citing Katz v. United States, 389 U.S. 347, 357 (1967). The fundamental command of the Fourth Amendment is that searches and seizures be reasonable. New Jersey v. T.L.O., 469 U.S. 325, 340 (1985). While ordinarily a warrant and full probable cause are required to satisfy the reasonableness standard of the Fourth Amendment, the Supreme Court has stated that "in certain limited circumstances neither is required." Id. at 340. (teacher or other school official may search students when there are "reasonable grounds for suspecting that the search will turn up evidence that student has violated or is violating either the law or the rules of the school."

Id. at 341-42). See also Delaware v. Prouse, 440 U.S. 648, 663 (1979) (car may be stopped without a warrant and its driver detained while documents are checked if there is at least an "articulable and reasonable suspicion" that a motor vehicle violation or other illegality has occurred); Terry v. Ohio, 392 U.S. 1 (1968) ("stop and frisk" of individual by police officer is permissible if "a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger.").

The Supreme Court, however, has not yet considered whether or not a warrant based upon full probable cause is required to justify the type of mandatory urine testing proposed here. Except in the case of a "well-delineated exception" to the

warrant requirement, a court should not dispense with that requirement lightly. We are mindful that "the police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure...." Terry v. Ohio, 392 U.S. at 20. However, we also recognize that where the purpose of the search is to detect the presence of an illegal substance in the body, the delay entailed in obtaining a warrant could well frustrate that purpose, due to the eventual dissipation of the substance searched for. See Schmerber v. California, 384 U.S. 757, 770-71 (1966). Therefore, it may not be practicable for Washington Township to obtain a search warrant in a timely fashion when the need arises to test a police officer for the presence of drugs in his body. The strict

requirement of obtaining a search warrant may be dispensed with if "'the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search.'" New Jersey v. T.L.O., 469 U.S. at 340 (quoting Camara v. Municipal Court, 387 U.S. 523, 532-33 (1967)). We therefore conclude that Washington Township authorities need not obtain a warrant before requiring that a police officer submit to urinalysis drug testing. The next question is the reasonableness of the warrantless searches proposed by Washington Township.

RANDOM DRUG TESTING

The Township's proposed plan would permit drug testing to be initiated in a number of ways. However, the plaintiffs accurately assert that the random selection

of police officers for drug testing is the "heart and soul" of the constitutional question before this court.

"The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is to be conducted." Bell v. Wolfish, 441 U.S. 520, 559 (1979).

The reasonableness of random drug testing in this case must be determined by balancing the need to conduct a random drug search against the resulting invasion of

the police officers' expectation of privacy. See O'Connor v. Ortega, 107 S. Ct. 1492, 1499 (1987); New Jersey v. T.L.O., 469 U.S. at 337.

Washington Township asserts that random drug testing of its police officers is justified under the rationale of cases permitting the random urine testing of public employees engaged in highly-regulated activities. We conclude that those cases are inapplicable to the present controversy.

The principle case involving mandatory random urinalyses of employees in a highly-regulated industry is Shoemaker v. Handel, 795 F.2d 1136, 1137 (3d Cir.), cert. denied, 107 S.Ct. 577 (1986). In Shoemaker, jockeys engaged in New Jersey's highly-regulated racing industry challenged

certain rules of the State Racing Commission. Those rules permitted the state racing steward to direct jockeys to submit to breathalyzer and urinalysis tests designed to detect the presence of alcohol or drugs. Id. at 1137. The rules were implemented by randomly testing between three and five jockeys at the conclusion of each racing day. Id. at 1140.

In upholding the random searches of jockeys in Shoemaker, the Third Circuit found that both prongs of the test for a warrantless administrative search had been met. First, there was a strong state interest in conducting an unannounced search in those particular circumstances. New Jersey has a significant financial interest in the horse racing industry. That financial interest is dependent upon

the confidence of the wagering public in the honesty and integrity of the sport. Second, the already pervasive regulation of the horse racing industry had sufficiently reduced the expectation of privacy held by the jockeys engaged in racing in New Jersey. Among other things, the jockeys knew that warrantless searches of stables and drug testing of horses had previously been authorized by the State Racing Commission. Id. at 1142.

The Shoemaker court clearly stated that "[o]ur holding applies only to breathalyzer and urine sampling of voluntary participants in a highly-regulated industry." Id. at 1142 n.5.

Washington Township's police officers are not engaged in a highly-regulated industry of the type dealt with in

Shoemaker. While police officers certainly operate within a framework of regulatory controls, a police officer does not carry out his duties in the same "intensely-regulated" atmosphere as that experienced by a jockey participating in horse racing. See Id. at 1142; Fraternal Order of Police v. City of Newark, 216 N.J. Super. at 469. To apply the reasoning of Shoemaker to the police officers in this case would extend Shoemaker well beyond the limited scope which that court intended for its ruling.

Rushton v. Nebraska Public Power District, 653 F.Supp. 1510 (D. Neb. 1987) also involved a highly regulated industry. The Rushton court largely relied on Shoemaker in permitting the random urine testing of personnel who had unescorted

access to "protected areas of the Cooper Nuclear Station (CNS)." Id. at 1524-25.

Recent occurrences at nuclear power plants in this country and abroad had established that a mishap at such a facility can cause serious damage and alarm extending even beyond national borders. As the Rushton court noted, a strong state interest, even more compelling than that in Shoemaker, exists for ensuring the safety of the public, the workers and the plant facility. Id. at 1524. Consequently, many regulatory safeguards are in place at CNS and other such facilities. Indeed, the Rushton court recognized the "pervasive regulation" surrounding the nuclear industry as a whole. Id. at 1254.

There is no such pervasive regulation of the police officers in the case at hand.

Any illusion that Washington Township's police force operates under a reduced expectation of privacy comparable to the situation in Rushton is dispelled by Judge Urbom's description of the Cooper Nuclear Station:

> "The protected area of CNS is completely surrounded by a fence, except at the point where the fence meets the security building. To enter the protected area, one must proceed through the entrance of the security building and pass, in single file, through explosive and metal detector devices. Random pat-downs are routinely performed and guards observe entrants for erratic behavior. Once within the confines of the protected area, each of the 700 individuals who are permitted unescorted access participate in the honor system. Variously located throughout the protected area are vital areas. Each vital area is a room with a door requiring a separate access code for entrance. The vital areas house the safety equipment, the equipment designed to prevent or

> mitigate a radiological release." Id. at 1513.
>
> ...
>
> "After an individual is admitted entrance, surveillance continues through the use of closed circuit television, micro-wave transmission, and personal observation.... [S]ecurity guards continually patrol the protected area. Moreover, the NRC routinely sends announced and unannounced personnel to CNS for inspection purposes. During the course of such inspections, it is not uncommon for a NRC representative to question CNS employees. Given all the foregoing considerations, I find that the plaintiffs have a diminished expectation of privacy while within the confines of CNS." Id. at 1525.

Washington Township's police officers do not work within the type of pervasive, intensive regulatory system which Judge Urbom describes in Rushton. It is clear that our decision in this case cannot rest on precedent which dealt with administra-

tive searches in highly-regulated industries.

While we have determined that Washington Township's police officers enjoy a greater expectation of privacy than employees in a highly-regulated industry, Washington Township believes that its officers' expectation of privacy is sufficiently diminished to permit what the defendant characterizes as minimally intrusive urine searches.

The Constitution does not protect every subjective expectation of privacy that a person might hold. In order to be protected under the Fourth Amendment, an expectation of privacy must also be one that society is "prepared to recognize as legitimate." New Jersey v. T.L.O., 469

U.S. at 338 (quoting Hudson v. Palmer, 468 U.S. 517, 526 (1984).

Public employees, such as police officers, may have a lessened expectation of privacy with respect to their employment, but they do not surrender all of their constitutional rights when they accept a public position. See Lovvorn, 647 F.Supp. at 880. In fact, the legitimate privacy interest of a public employee may be substantial. O'Connor v. Ortega, 107 S. Ct. at 1500. The reasonableness of the employee's expectation of privacy and the appropriateness of a proposed search must therefore be analyzed in the context of each employment setting. Id. at 2497.

The urine testing proposed here would entail a significant amount of intrusion into the private affairs of Washington

Township's police officers. Even limited searches of the person constitute a severe intrusion upon "cherished personal security." United States v. Afanador, 567 F.2d 1325, 1331 (5th Cir. 1978). The taking of a urine sample in order to reveal the personal physiological information contained therein, particularly the presence of illegal drugs, is a considerable intrusion upon an individual's reasonable expectation of privacy. See, e.g., Feliciano, 661 F.Supp. at 586.

While we have observed that the issue of mandatory drug testing of employees is a relatively modern phenomenon, we do not operate in a vacuum of legal analysis in this area. Within the past two years, there has been a plethora of reported decisions dealing with the propriety of

subjecting public employees to mandatory urinalysis tests. The overwhelming consensus of these cases is that a mandatory urinalysis intrudes upon a public employee's reasonable expectation of privacy when it is carried out in the absence of a reasonable suspicion that the employee has been using illegal drugs. McDonell v. Hunter, 809 F.2d 1302, 1308-1309 (8th Cir. 1987) (while prison guards identified as having regular, daily contact with prisoners must submit to random urinalysis, other guards within institution may only be tested on the basis of reasonable suspicion); Feliciano, 661 F.Supp. at 596 (N.D. Ohio 1987) (individual suspicion required to drug test police academy cadets); American Federation of Gov't Employees v. Weinberger, 651 F.Supp. 726,

739 (S.D. Ga. 1986) (reasonable suspicion needed for urinalysis of civilian police employed by Department of Defense); Capua, 643 F.Supp. at 1522 (reasonable suspicion needed to test firefighters); Jones v. McKenzie, 628 F.Supp. at 1508-1509 ("particularized probable cause" needed to test school bus attendant); Lovvorn, 647 F.Supp. at 883 (reasonable suspicion needed to test firefighters); Penny v. Kennedy, 648 F.Supp. 815, 817 (E.D. Tenn. 1986) (reasonable suspicion needed to test police officers); Fraternal Order of Police v. City of Newark, 216 N.J. Super. at 474 (reasonable suspicion required for testing police officers); City of Palm Bay v. Bauman, 475 So.2d 1322, 1326 (Fla. Dist. Ct. App. 1985) (reasonable suspicion needed to test police or firefighters);

Caruso v. Ward, 506 N.Y.S.2d 789, 799 (Sup. Ct. 1986) (reasonable suspicion needed to test members of organized crime control bureau); Patchoque-Medford Congress v. Bd. of Ed., 505 N.Y.S.2d 888, 891 (N.Y. App. Div. 2nd Dept. 1986), aff'd. 70 N.Y.2d 57, 517 N.Y.S.2d 456, 510 N.E.2d 325 (1987) (reasonable suspicion required to test public school teacher).

It follows then that a broad class of public employees, such as "all municipal employees" or "all police officers," may not be subjected to random urinalysis, since such a testing program results in searches without any level of individualized suspicion whatsoever. See McDonell, 809 F.2d at 1308-1309 (only those guards identified as having regular, daily contact with prisoners may be randomly

tested, reasonable suspicion is required to test all others); City of Palm Bay v. Bauman, 475 So.2d 1322 (Fla. Dist. Ct. App. 1985) (random testing of police and firefighters prohibited); Caruso v. Ward, 506 N.Y.S.2d at 799 (random testing of police officers prohibited).

The random drug testing which the defendants propose in this case can be analogized to previous attempts to "mass test" an entire group of public employees. The reasoning employed in cases which have disallowed the urine testing of groups of public employees en masse is applicable to the random testing program proposed here.

Mass testing programs have generally been disallowed because they are not based on a standard of individualized, reasonable suspicion. Feliciano, 661 F.Supp. at 596;

American Federation of Gov't Employees, 651 F.Supp. at 739 (S.D. Ga. 1986); Capua, 643 F.Supp. at 1522; Jones v. McKenzie, 628 F.Supp. at 1508-1509; Lovvorn, 647 F.Supp. at 883; Penny v. Kennedy, 648 F.Supp. at 817; Fraternal Order of Police v. City of Newark, 216 N.J. Super. at 474; City of Palm Bay v. Bauman, 475 So.2d at 1326; Patchoque-Medford Congress v. Bd. of Ed., 505 N.Y.S.2d at 891.

Both random and mass testing programs entail the search of individuals whether or not there is any reason to suspect that they have used illegal drugs. Eventually, a random drug testing program will subject the entire Washington Township police force to a mandatory urinalysis. In that respect, the only distinction between random and mass testing is that in a random

drug testing program the entire group is tested on a piecemeal basis.

Thus, the random drug testing program proposed by Washington Township does not differ in a constitutionally significant way from the mass testing procedures which were ruled impermissible in the cases cited above.

Washington Township mistakenly asserts that its proposal has cured the constitutional defects which invalidated mandatory drug testing programs in other cases, by arguing that previous testing programs have been struck down for reasons other than a lack of individualized, reasonable suspicion. For example, the defendant notes that in Capua, there was a highly intrusive mass round-up of all the fire-

fighters in a firehouse for testing. See Capua, 643 F.Supp. at 1511.

Judge Sarokin was justified in reacting strongly to the surprise testing, en masse, of the Plainfield firefighters. Capua, 643 F.Supp. at 1521. However, we do not find that the result in Capua would differ if the mass testing had been carried out in a less offensive manner. The constitutional standard enunciated in Capua was that mandatory department-wide urine testing was not permissible because it was not based upon "individualized, reasonable suspicion." Id. at 1522. Mass or random testing, though it might be carried out in a more civilized manner, will still fail to meet that standard.

Washington Township also defends its planned random urine testing program on the

grounds that it would operate under a set of well-defined written standards and procedures. It is true that previous opinions have decried the absence of well-defined administrative guidelines and standards in drug testing programs. See, e.g., Capua, 643 F.Supp. at 1521. However, the standard which was most significantly absent from those programs was one authorizing testing only on the basis of individualized suspicion. See Lovvorn, 647 F.Supp. at 880-81. The adoption and dissemination of a written drug testing policy will not satisfy the Fourth Amendment where the effect of that policy is to expose the individual to a constitutionally unreasonable search.

Washington Township's plan would give its employees at least sixty days advance

notice before testing would begin. Advance notice of Washington Township's drug testing policy does not render it reasonable. Washington Township's drug policy offers its employees the choice of either submitting to an unreasonable search or risking the loss of their employment. A government employer cannot require that employees submit to an unconstitutional search as a condition of their employment, McDonell, 809 F.2d at 1310 (citing Pickering v. Board of Education, 391 U.S. 563, 568 (1968). Nor would the fact that employees remained in their jobs after the announcement of the drug testing policy amount to consent to the proposed searches. Even if all employees were required to sign a form consenting to an otherwise unreasonable search, the form would not

operate as a waiver of their constitutional rights. McDonell, 809 F.2d at 1310.

Nor does the fact that subject police officers would, in most cases, be permitted to urinate in private reduce the intrusiveness of a search sufficiently to satisfy the Fourth Amendment. Urination is a highly private act which is most often carried out in an unobserved setting. Therefore, the taking of urine samples under direct supervision would be an additionally intrusive procedure. Feliciano, 661 F.Supp. at 586. However, the essence of the search involved in any urinalysis is the taking of urine in order to "discover the personal physiological secrets which it holds." Capua, 643 F.Supp. at 1513. "This search involves 'probing into an individual's private life'

as surely as if an employer would enter an employee's home to inspect for drugs or other contraband or to obtain more information about that employee." Feliciano, 661 F.Supp. at 586. Thus, the taking of a urine sample for drug testing, even in an unobserved setting, intrudes upon a police officer's reasonable expectation of privacy.

The fact that Washington Township's testing will be limited to the detection of illegal drugs does not reduce the intrusiveness of the search. The defendant's assertion that police officers have no legitimate right to privacy regarding illegal drug use is without merit. Clearly, random drug testing will subject the majority of innocent police officers to a highly intrusive search. A search under

the Fourth Amendment must be "justified at its inception," and "reasonably related in scope to the circumstances which justified the interference in the first place." New Jersey v. T.L.O., 469 U.S. at 341. The Township's argument attempts to introduce an element of hindsight into our analysis which is wholly impermissible under the Fourth Amendment. The assertion that individuals have no right to object to an unreasonable search because it is aimed at uncovering wrongdoing is an argument which would render the Fourth Amendment's protection meaningless. The "constitutionality of a search cannot rest on its fruits." Capua, 643 F.Supp. at 1516.

The defendants' proposed plan indicates that "[d]rug testing shall not be conducted for the purpose of gathering

evidence for use in criminal proceedings." The plan states that any employee found to be using illegal drugs will be referred to an Employee Assistance Program for "assessment, counseling, and referral for treatment or rehabilitation as appropriate." The policy also seems to give the Township the authority, at its discretion, to discipline or dismiss such employees. The proposal indicates that the Township will initiate action to remove employees who refuse counseling or rehabilitation or who are found to use illegal drugs a second time.

The Fourth Amendment is fully applicable here even though the proposed searches are not undertaken for the purpose of uncovering evidence for criminal prosecution. The Supreme Court "has never

limited the Amendment's prohibition on unreasonable searches and seizures to operations conducted by the police. Rather, the Court has long spoken of the Fourth Amendment's strictures as restraints imposed upon 'governmental action' -- that is, 'upon the activities of sovereign authority.'" New Jersey v. T.L.O., 469 U.S. at 335 (quoting Burdeau v. McDowell, 256 U.S. 465, 475 (1921). "The basic purpose of this Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials.... Because the individual's interest in privacy and personal security 'suffers whether the government's motivation is to investigate violations of criminal laws or breaches of

other statutory or regulatory standards, ... it would be 'anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior.'" New Jersey v. T.L.O., 469 U.S. at 335 (citations omitted). The Fourth Amendment protects the Township's police from any unreasonable searches designed to uncover evidence of drug use for disciplinary purposes.

We fully recognize the Township's legitimate need to ensure that its employees, especially police officers, do not engage in the use of illegal drugs, on or off-duty. Drug abuse by police officers can certainly impair their performance and create situations in which members of the public are placed at risk. This important

need to ensure a drug-free public workforce has been recognized in virtually all of the decisions which have reviewed mandatory drug testing programs. See e.g., Lovvorn, 647 F.Supp. 879; Penny, 648, F.Supp. at 817.

The standard of reasonable, individualized suspicion recognizes this legitimate need of the government and adequately accommodates it in this case. See, e.g., Lovvorn, 647 F.Supp. at 883; Capua, 643 F.Supp. at 1518; Fraternal Order of Police v. City of Newark, 216 N.J. Super. at 473.

We have found that a warrant is not necessary to authorize the drug testing of suspected police officers because the evidence of drug abuse is evanescent and the government has a legitimate need to

uncover such evidence in a timely fashion. The threshold requirement of reasonable suspicion to justify such a warrantless intrusion is an appropriate lessening of the "probable cause" ordinarily required for a Fourth Amendment search. This standard allows the government to act upon reasonable suspicions based on objective facts and all reasonable inferences drawn therefrom. Objective facts leading to reasonable suspicion may be derived from a variety of sources, including "physical observation of police officers, citizens complaints, tips from other law enforcement agencies and other means." Penny, 648 F.Supp. at 817. Such methods of arriving at reasonable suspicion adequately serve the government's need to identify and test

individual police officers who may be using illegal drugs.

From the standpoint of protecting a police officer's reasonable expectation of privacy, this standard will permit a magistrate to review, after the fact, the reasonableness of an ordered search. Having dispensed with the requirement that a magistrate approve a warrant prior to searching, we believe it is important in this case to establish at least a minimal standard by which an individual can seek judicial review of the actions taken against him. In contrast, under the proposed random testing plan offered by the Township, all randomly-conducted searches would be per se "reasonable" and there would be no opportunity for review on an individualized basis. The Township has

failed to demonstrate that it needs to undertake such "carte blanche" random searches of its police officers.

Washington Township has based the need to randomly drug test its police officers on the fact that drug abuse is a statistically wide-spread problem in the United States. No such wide-spread problem has been identified among the Washington Township police. There has been no assertion that any member of the Washington Township police force has been involved in illegal drug use. Instead, the Township has recited a series of statistics regarding the level of illegal drug use in our society as a whole.

Illegal drug use is indeed a serious problem in our society. However, we cannot permit statistics drawn from the mass of

society to authorize the urine testing of an entire police force which has not been implicated in any illegal drug use.

In balancing the governmental need against the private intrusion presented by random testing, the absence of a "showing that drug use is widespread among the affected employees or that it presents an identifiable risk to the public[,]" is a factor heavily weighing in favor of the privacy interests of the individuals affected. Fraternal Order of Police, 216 N.J. Super. at 472. See also Feliciano, 661 F.Supp. at 588; Lovvorn, 647 F.Supp. at 882; Penny, 648 F.Supp. at 816-17; Capua, 643 F.Supp. at 1516; City of Palm Bay, 475 So.2d at 1325; Caruso, 506 N.Y.S.2d at 795, 799.

The defendant relies on Nat'l Assoc. of Air Traffic Specialists v. Dole, No. A87-073, slip op. (D. Alaska 1987). In Dole, flight service specialists were required by the Federal Aviation Administration (FAA) to be tested via an unobserved urinalysis for a variety of illegal drugs as part of a yearly medical examination. The medical examination was necessary in order for the flight specialists to retain a medical clearance to perform safety-related duties within the FAA. A positive test result in the yearly physical would "provide reasonable suspicion that the employee is a substance abuser and will subject the employee to more intrusive observed random urinalysis testing for a period of one year." Dole, slip op. at 1-2.

The flight service specialists in Dole sought a preliminary injunction to halt the testing program. In denying that request, Judge Fitzgerald discussed statistical evidence of drug abuse in society as a whole, which he found to be "compelling." Dole, slip op. at 53. However, Judge Fitzgerald had already determined that the "close and pervasive regulation of aviation related activities is well established and that air safety relates to serious risks or hazards which require close and constant attention." Dole, slip op. at 34. The judge discussed Rushton and Shoemaker at length, Dole, slip op. at 29-35, and concluded that "[i]f horse racing is recognized as a closely or pervasively regulated activity, then aviation activities and the aviation industry are

as much or possibly more closely regulated." Dole, slip op. at 34. We have already determined that cases such as Shoemaker and Rushton, dealing with highly-regulated industries, are inapplicable here. See supra.

Further, while Judge Fitzgerald found the statistical evidence of widespread drug abuse in our society to be "compelling," Dole, slip op. at 53, he also observed that in 1986, forty five air-traffic controllers from fourteen cities had entered drug rehabilitation programs. The judge concluded that "[o]bviously, the agency has evidence of a substance abuse problem involving personnel performing safety-related duties." Dole, slip op. at 6. There has been no similar showing regarding

a drug problem within Washington Township's police force.

The follow-up "random" testing in Dole was carried out only on the basis of individualized suspicion. Individuals who had already tested positive for drugs in a yearly physical exam could be re-tested at random times during the subsequent year. Dole, slip op. at 2.

Judge Fitzgerald did not review a proposed plan of the Department of Transportation which would include truly random testing of employees in critical safety and security positions. Dole, slip op. at 70. Therefore, the Dole court did not authorize the type of truly random drug-testing plan proposed here.

The need to ensure that the Township's police are drug-free is an important one.

Important public safety concerns are associated with a police officer's duties. However, the need to prevent a major airline disaster presents a far more compelling rationale for drug testing than those presented by the Township of Washington in this case. Judge Fitzgerald reviewed the vital role that flight service specialists play in preventing air disasters. Dole, slip op. at 49-53.

Air traffic controllers and flight service specialists hold thousands of lives in their hands on a daily basis. They are engaged in an industry that is already pervasively regulated. Consequently, their expectation of privacy with respect to their employment is already significantly diminished. There is evidence that drug abuse is already a serious problem within

their ranks. These compelling circumstances are absent in the present case. Therefore, the task of maintaining a drug-free police force in Washington Township may reasonably be pursued by less severe methods.1/

Washington Township's efforts to uncover illegal drug use by police will not suffer because urine testing must be based on reasonable suspicion. Less intrusive means, such as direct observations of

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1/ For these reasons, our decision in this case is not inconsistent with the holding in American Federation of Gov't Employees v. Dole, No. 87-1815 (D.D.C. filed Sept. 30, 1987). In that recent decision, Judge Gesell approved a Department of Transportation plan which permits the random testing of "certain employees in sensitive positions." Slip op. at 2. Ninety-four percent of the "critical positions" subject to testing were in the aviation industry, e.g. air traffic controllers and aircraft mechanics. Id. at 3.

officers by their superiors and co-workers, will be strong components of an on-going effort to detect drug abuse among officers. When the objective facts lead to a reasonable suspicion that a particular officer is using drugs, the Township may order the officer to submit to a urinalysis to confirm or disprove that suspicion.

A random drug testing program is not the most efficient method of detecting drug abuse. A random test may reveal that the individual tested has recently used an illegal drug. However, by its very randomness, it is just as likely to subject an innocent person to testing. It is evident that random searches of citizens' homes would not be an efficient means to search for the evidence of crimes. Likewise, the energies devoted to a random

drug testing program can be more efficiently spent examining individual behavior and other objective facts to determine when reasonable suspicion dictates that a search be directed at a specific officer.

Washington Township's proposed drug testing plan already has a provision authorizing the Township to order a urinalysis when a reasonable suspicion exists that a particular officer is using drugs. The existence of this effective and less intrusive means to the same end mitigates against the use of more intrusive, random testing. E.g., Penny v. Kennedy, 648 F.Supp. at 815.

The defendant attempts to characterize several appellate court decisions as representing the "unanimous" approval by

circuit courts of mandatory drug testing plans. Nothing in the recent decisions of our appellate courts conflicts with the standards we have established here. No decision has authorized the random testing of a wide group of municipal employees such as the police officers represented here.

In McDonell v. Hunter, the Eighth Circuit reviewed proposed random urinalysis searches of individuals employed within correctional facilities. 809 F.2d at 1304-1305. The court observed that a prison is 'a unique place fraught with serious security dangers." Id. at 1308 (quoting Bell v. Wolfish, 441 U.S. at 559). The Eighth Circuit found that a prison employee's reasonable expectation of privacy is reduced by this unique surrounding. See id. at 1308. However,

the court authorized the limited uniform or random urine testing of only those guards who have "regular contact with the prisoners on a day-to-day basis in medium or maximum security prisons." Id. Even within the highly-regulated environment of a prison's confines, the court ruled that all other prison employees could only be tested:

> "on the basis of a reasonable suspicion, based on specific objective facts and reasonable inferences drawn from those facts in light of experience that the employee is then under the influence of drugs or alcohol or that the employee has used a controlled substance within the twenty-four hour period prior to the required test. The demand for urine, blood, or breath specimen should be made only on the express authority of the highest officer present in the institution, and the specific, objective facts should be disclosed to the employee at the time the demand is made." Id. at 1308-1309.

McDonell is persuasive authority that random drug testing may only be carried out with respect to a well-defined group of individuals in the presence of some compelling government need and a severely reduced expectation of privacy. The McDonell court preserved the individualized, reasonable suspicion standard and buttressed it with considerable safeguards for most of the employees within correctional facilities.

Washington Township's police officers enjoy a greater expectation of privacy than employees within a correctional facility. They do not operate within the highly-regulated and uniquely dangerous surroundings of such a facility. Therefore, they are deserving of at least as much protection as the court in McDonell

afforded to those prison guards who do not have regular, daily contact with prisoners in medium and maximum security prisons.

In Division 241 Amalgamated Transit Union v. Suscy, 538 F.2d 1264 (7th Cir.) (per curiam), cert. denied, 429 U.S. 1029 (1976), the court permitted a plan which authorized the blood and urine testing of "[o]perating employees directly involved in any serious accident such as a collision of trains, collision of buses, derailment, ... or serious collision with vehicle or fixed object...." Id. at 1266. Such tests were only carried out with the additional concurrence of two supervisory personnel. Id. at 1267. We agree that following a serious mass-transit collision the public interest is sufficiently compelling to authorize the testing approved in Suscy.

Absent a serious accident, the regulations approved in Suscy only permitted the testing of individual bus drivers who were suspected of being under the influence of drugs or alcohol. Id. at 1266. Therefore, Suscy is not inconsistent with the standard of individualized, reasonable suspicion which we have adopted here. Suscy cannot be used to justify the random drug testing of an entire police force.

In National Treasury Employees Union v. Von Raab, 816 F.2d 170, 177 (5th Cir.), stay denied, 107 S. Ct. 2479 (1987), the court permitted that a drug urinalysis be required of customs service employees who seek a transfer to certain "sensitive positions." The Von Raab court relied on several factors which do not exist in this case. First, the testing was limited only

to those employees who set in motion an application to be transferred to a "sensitive position." In the present case, Washington Township wishes to randomly test all police officers, regardless of their duties. The tests here would be initiated by the government's random selection process, not by an officer's pursuit of a more "sensitive" position. Second, the Von Raab court believed that the plan it was reviewing was "to some extent, consensual ...[,]" since the affected employees could avoid the urinalysis by withdrawing their application for the sensitive position. No adverse consequences would result from such a withdrawal. Id. at 178. Washington Township's random drug testing plan would permit no such discretion by selected employees, short of leaving the police

force altogether. Third, Von Raab analogized employees who seek sensitive customs service positions involving "drug interception" to employees engaged in highly-regulated activities. Id. at 179-80. The operation of Washington Township's police force is not analogous to the operation of a highly-regulated industry. Thus, Von Raab does not authorize the type of mandatory, random urinalysis of all public employees which Washington Township is proposing here.

We have found no decision by a circuit court which would justify the random drug testing of Washington Township's police force. Quite to the contrary, the trend within the judiciary has been to require individualized, reasonable suspicion before

a public employee may be drug tested by urinalysis.

MANDATORY ANNUAL URINALYSIS DRUG TESTING

Washington Township's proposed drug testing policy also requires each municipal employee to undergo a yearly medical examination in the month of their birth. This medical examination would "include" a urinalysis aimed at detecting illegal drug use. The proposed policy goes on to say that "[t]he above guidelines do not in any way prohibit or regulate the Township from requiring more than one regularly scheduled and announced medical examination of employees of certain municipal departments to ensure that employees are physically fit to perform their duties without risk of harm to themselves or to others." Plan, section 4, pg. 3.

The plaintiffs contend that the "medical examinations" called for in the proposed policy are a mere "pretextual sham" to accomplish urinalysis drug testing. The defendant cites Rushton and Dole as cases which authorized urinalysis drug testing as part of annual employee physicals. We have already distinguished both of those cases on the grounds that they dealt with employees in highly-regulated industries.

Section four of the proposed drug testing policy states simply: "All municipal employees will be required to have an annual medical examination as a condition of employment with the Township of Washington. The annual medical exam will include urinalysis testing." Plan, section 4, pg. 3.

The plaintiffs are not challenging, and this opinion does not address whether the Township may require a bona fide yearly medical examination for all employees. Our analysis of the plan presented by Washington Township indicates that it is plainly a drug testing plan and not a bona fide medical fitness plan. It is entitled "Drug Testing Program of the Township of Washington." Its twenty-five pages are devoted to the methods by which employees may be tested via urinalysis for illegal drug use. The requirement of an annual medical examination as a condition of employment is contained in one sentence, with the following sentence indicating that this annual exam will include a urinalysis test for drugs. No other types of physical tests or guidelines are established to

determine when a municipal employee will be medically fit for duty.

The issue clearly presented by this plan is whether it is reasonable, under these circumstances, to require that all police officers submit to an annual urinalysis drug test. In the absence of reasonable suspicion, a police officer does not reasonably expect to be subjected to such a search. The Township attempts to justify its mandatory drug testing program by the mere desire to "prevent" a drug abuse problem. There has been no showing of a widespread drug abuse problem among the Washington Township police. The assertion by plaintiffs, that there is no evidence of drug abuse whatsoever, has gone unrebutted.

Based on a weighing of the factors in this case, it would be unreasonable to subject all members of the Washington Township police force to an annual urinalysis search for drugs. Urinalysis searches may only be ordered based on individualized, reasonable suspicion of illegal drug use. This less intrusive approach will be an effective means of uncovering drug abuse by individual police officers, while respecting the rights of those officers whose conduct is above such suspicion.

It is not clear whether section four of the proposed drug testing plan is intended to authorize additional "medical examinations" which would "include" urine testing. Perhaps the Township has merely reserved the right to conduct other

"regularly scheduled and announced" medical tests of certain municipal employees, with no intent to include drug testing as a part of those examinations. If that is the case, this opinion does not deal with the issue of bona fide medical examinations of employees.

If, on the other hand, the Township is proposing the use of discretionary "medical examinations" in order to carry out drug testing, this would violate the standard of individualized, reasonable suspicion which must be met before a police officer may be subjected to such a search.

Plaintiffs, by virtue of their stipulation do not challenge that aspect of the proposed plan which requires the preemployment drug testing of police recruits. Therefore, this opinion does not

address that portion of the Township's proposal.[2/]

CONCLUSION

In or decision today, certain important principles are upheld. Our police officers are not above the law. They may not engage in illegal drug use with impunity. When a reasonable suspicion exists that one of the officers whom we rely on to uphold the law is in fact violating it -- the government may take effective steps to uncover evidence of that wrongdoing.

Equally important, however, is the principle that our public servants are not

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2/ We note that at least one court has found preemployment urine testing to be permissible under the Fourth Amendment. McDonell v. Hunter, 612 F.Supp. 1122, 1130 N.6 (D.C. Iowa 1985), modified on other grounds, 809 F.2d 1302 (8th Cir. 1987).

beneath the protection of the law. Individual police officers who carry out their duties in a manner which is above any reasonable suspicion of wrongdoing are entitled to be free of intrusive searches of their persons. Just as the police officer may not search persons on the street without some reasonable suspicion, neither is he subject to standardless searches by his superiors.

Absent a more compelling need than was present in this case, we are not prepared to replace the standard of reasonable suspicion, which a magistrate can review, with standardless searches initiated by a random program. The police officers of

Washington Township are deserving of greater constitutional protection.[3/]

JUDGMENT AND ORDER

It is the judgment of this court that the Proposed Drug Testing Policy of Washington Township violates the Fourth Amendment insofar as it permits searches prohibited by the following injunction.

The defendant Washington Township, its officers, agents, servants and employees, are hereby enjoined from requiring police officers to submit samples of their urine to be tested for the presence of illegal

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3/ We note that wa recent decision of the New Jersey State Appellate Division has also adopted a "reasonable suspicion" standard for the drug testing of police officers. Fraternal Order of Police v. City of Newark, 216 N.J. Super. 461, 474 (App. Div. 1987). In Fraternal Order, Judge Gaulkin relied upon Article I, Sec. 7 of the New Jersey Constitution, the language of which is nearly identical to the Fourth Amendment. Id. at 477.

drugs, except when there exists an individualized, reasonable suspicion based on objective facts and reasonable inferences drawn therefrom, that a particular police officer has engaged in the use of illegal drugs.

The defendants' motion for summary judgment is denied. The plaintiffs' motion for summary judgment is granted, consistent with the above opinion.

JOSEPH H. RODRIGUEZ
U.S.D.C.

Dated: October 8, 1988

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-5793

POLICEMAN'S BENEVOLENT ASSOCIATION OF NEW JERSEY, LOCAL 318 and EDMUND GIORDANO, Individually, and as President of the Policeman's Benevolent Association of New Jersey, Local 318

v.

TOWNSHIP OF WASHINGTON (Gloucester County), a Municipal Corporation Under the Laws of New Jersey, JOHN ROBERTSON, Mayor, LEONARD SIMMONS, DANIEL MANGINI, MARGARET SMITH, RICHARD MARSELLA, and VIRGINIA WEBER, Council Members

Township of Washington and John Robertson, Mayor, Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Argued: May 3, 1988
Before: GIBBONS, Chief Judge, and MANSMANN and COWEN, Circuit Judges

(Opinion Filed: June 21, 1988)

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OPINION OF THE COURT

GIBBONS, Chief Judge:

The Township of Washington, New Jersey, appeals from a summary judgment in favor of the plaintiffs, Policemen's Benevolent Association of New Jersey, Local 318, and Edmund Giordano, a police officer,

in a suit challenging on Fourth Amendment grounds the Township's drug testing program for police officers. The district court held that a drug testing program involving any selection method other than individualized reasonable suspicion violated the Fourth Amendment, and enjoined enforcement of the Township's random testing and annual medical examination programs for police officers. We will reverse.

I.

The drug testing policy which the Township police officers challenge is embodied in a document entitled Drug Testing Program of the Township of Washington, adopted in November, 1986 and revised February 25, 1987. The police officers' lawsuit was filed, however, on

September 8, 1986, in response to a memorandum from the Mayor of the Township to all department heads and municipal employees announcing that the Township would begin a mandatory drug testing program. That announcement, dated August 5, 1986, was apparently made in response to the call on August 4, 1986 by President Ronald Reagan for every level of government to take steps to assure a drug free work place. The August 5, 1986 announcement contained no details of the proposed plan. Nevertheless the complaint alleged that "no guidelines for the protection of police employee's privacy were announced nor was there announced a method of assuring that said test would accurately reflect the presence of controlled dangerous substances in an employee's system." Complaint, Count

I, ¶4. The proposed program was alleged to violate the First, Fourth, Fifth, Ninth and Fourteenth Amendments of the United States Constitution, and Article I, paragraphs 1, 2 and 7 of the New Jersey Constitution. Injunctive relief and damages were requested solely on behalf of Township police officers.

The plaintiffs sought pendente lite relief, but since the complaint was obviously premature an ex parte temporary restraining order was dissolved and a preliminary injunction was denied. Thereafter the Township formulated and revised the drug testing program. The plaintiffs then stipulated that they now challenge the revised plan as unconstitutional in only three respects:

A. Those aspects which require random

mandatory testing of employees represented by Plaintiff [police officers];

B. Those aspects which would require testing as part of any pre-textual physical examination, i.e., any physical examination which is not a bona fide medical examination given in the ordinary course of business and as a matter of the Township's policy for its police officers;

C. Those aspects which would require testing of all employees in mass form as within the dispositive facts of Capua v. City of Plainfield [643 F. Supp. 1507 (D.N.J. 1986)].

Stipulation dated May 18, 1987. Thus the plaintiffs withdrew any challenge to the plan on the basis of lack of assurance of privacy, or lack of assurance of accuracy.4/

The plan calls for both testing on reasonable suspicion and random testing. The effect of the stipulation is to

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4/ The plan contains detailed safeguards for maintaining the privacy of the testing and test results, and for assuring accuracy of the test results.

withdraw any challenge to the requirement of drug testing based on reasonable suspicion. The plan also requires all employees to undergo an annual medical examination, which includes urinalysis. The effect of the stipulation is to challenge the annual medical examination requirement for police officers only to the extent that it is a pretext for obtaining body fluids for drug testing. The reference in the stipulation to Capua v. City of Plainfield, 643 F. Supp. 1507 (D.N.J. 1986), is to the holding in that case that a universal mass urinalysis of fire department employees of the City of Plainfield was unconstitutional.[5/] The

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5/ The Capua court held (1) that the Plainfield plan contained no procedural protection or confidentiality guarantees, and (2) that the fire department was not a

(continued...)

stipulation also excludes any challenge to the plan as applied to applicants for jobs as policemen. Thus the area of dispute was by stipulation narrowed to two question: (1) whether a police department may require that police officers submit to random selection for urinalysis which will detect drug use; and (2) whether a police department may require that all police officers submit to an annual urinalysis which will detect drug use.

The parties filed cross-motions for summary judgment. The district court, relying solely on the Fourth Amendment, answered both questions negatively and granted the plaintiffs a summary judgment,

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5/ (...continued)
highly regulated industry. 643 F. Supp. at 1519, 1521. In this case the Washington Township Plan is not challenged on the first Capua ground.

enjoining Washington Township "from requiring police officers to submit samples of their urine to be tested for the presence of illegal drugs, except when there exists an individualized, reasonable suspicion based on objective facts and reasonable inferences drawn therefrom, that a particular police officer has engaged in the use of illegal drugs."

II.

This court addressed the problem of state-imposed compulsory drug testing as a condition of certain types of employment in Shoemaker v. Handel, 795 F.2d 1136 (3d Cir.), ~~cert.~~, denied, 107 S.Ct. 577 (1986). That case upheld against a Fourth Amendment search and seizure challenge, requirement that jockeys employed in the New Jersey horse racing industry submit to universal

daily breathalyzer and random urinalysis testing. Recognizing that both the universal breathalyzer test and the random urinalysis involved seizures within the meaning of the Fourth Amendment, we held that in a highly regulated industry such as horse racing the administrative search exception to the Fourth Amendment warrant requirement applied. That exception applied because the state had a strong interest in conducting an unannounced search, and because pervasive regulation in the industry reduced justifiable expectations of privacy. 795 F.2d at 1142. Because the Racing Commissions's discretion was sufficiently circumscribed by the universal breathalyzer and random selection urinalysis requirements, we rejected the contention that the searches in question

involved the exercise of standardless discretion. Id. at 1143.

The Washington Township Plan, as interpreted by the district court, involves both types of selection dealt with in Shoemaker. The plan's provision for random selection for urinalysis contains essentially the same procedural and privacy protections which we upheld in Shoemaker. The universal annual urinalysis for all police officers is the equivalent of the universal daily breathalyzer test for jockeys. Thus Shoemaker controls on the two issues presented in this appeal, unless we hold that the Washington Township Police Department is not a highly regulated industry to which the administrative search exception applies. The dispositive questions are (1) whether the state has a

strong interest in determining whether police officers are using illegal substances, and (2) whether the pervasive regulation of the police industry reduced the justifiable privacy expectations of those officers.

The district court opined, and we agree, that "[t]he need to ensure that the Township's police are drug free is an important one. Important public safety concerns are associated with a police officer's duties." Despite the recognition of this strong public interest, however, the district court concluded that police officers had expectations of privacy which mandated that urinalysis be required only upon individualized reasonable s suspicion of illegal drug use. Our review of this legal conclusion is plenary.

Washington Township maintains a police department pursuant to authority delegated to it by N.J. Stat. Ann. § 40A:14-118 (West Supp. 1987), which provides:

> The governing body of any municipality, by ordinance, may create and establish, as an executive and enforcement function of municipal government, a police force, whether as a department or as a division, bureau or other agency thereof, and provide for the maintenance, regulation and control thereof. Any such advance ordinance shall, in a manner consistent with the form of government adopted by the municipality and with general law, provide for a line of authority relating to the police function and for the adoption and promulgation by the appropriate authority of rules and regulations for the government of the force and for the discipline of its members. The ordinance may provide for the appointment of a chief of police and such members, officers and personnel as shall be deemed necessary, the determination of their terms of office, the fixing of their compensation and the prescription of their powers, functions and duties, all as the governing body shall deem necessary for the effective government of the force. Any such ordinance, or rules and regulations, shall provide

that the chief of police, if such position is established, shall be the head of the police force and that he shall be directly responsible to the appropriate authority for the efficiency and routine day to day operations thereof, and that he shall, pursuant to policies established by the appropriate authority:

a. Administer and enforce rules and regulations and special emergency directives for the disposition and discipline of the force and its officers and personnel;

b. Have, exercise, and discharge the functions, powers and duties of the force;

c. Prescribe the duties and assignments of all subordinates and other personnel;

d. Delegate such of his authority as he may deem necessary for the efficient operation of the force to be exercised under his direction and supervision; and

e. Report at least monthly to the appropriate authority in such form as shall be prescribed by such authority on the operation of the force during the preceding month, and make such other reports as may be requested by such authority.

As used in this section, "appropriate authority" means the mayor, manager, or such other appropriate executive or administrative officer, such as a full-time director of public safety, or the governing body or any designated committee or member thereof, or any municipal board or commission established by ordinance for such purposes, as shall be provided by ordinance in a manner consistent with the degree of separation of executive and administrative powers from the legislative powers provided for in the charter or form of government either adopted by the municipality or under which the governing body operates.

Except as provided herein, the municipal governing body and individual members thereof shall act in all matters relating to the police function in the municipality as a body, or through the appropriate authority if other than the governing body.

Nothing herein contained shall prevent the appointment by the governing body of committees or commissions to conduct investigations of the operation of the police force, and the delegation to such committees or commissions of such powers of inquiry as the governing body deems

> necessary to conduct such hearing or investigation authorized by law. Nothing herein contained shall prevent the appropriate authority, or any executive or administrative officer charged with the general administrative responsibilities within the municipality, from examining at any time the operations of the police force or the performance of any officer or member thereof. In addition, nothing herein contained shall infringe on or limit the power or duty of the appropriate authority to act to provide for the health, safety or welfare of the municipality in an emergency situation through special emergency directives.

In one form or another the power to adopt regulations for the organization and discipline of a police force has been conferred on New Jersey municipalities since at least 1884. See, e.g., Hermann v. Town of Guttenberg, 86 N.J.L. 681, 94 A. 308 (1914). See also N.J. Stat. Ann. § 40:48-1 (West Supp. 1987) (general and regulatory powers of municipalities).

The broad grant of regulatory authority to Washington Township in the matter of the government and discipline of its police force is subject to "general law," which includes an extensive body of state statutory law. Among other things the state regulates hours of service, N.J. Stat. Ann. §§40A:14-108, 40A:14-132, minimum salaries, §§ 40A:14-110, 40A:14-131, age, §40A:14-127, days of employment and days off, §40A:14-133, emergency service and compensation for such service, §40A;14-134, and suspension and removal, §§40A:14-156, 40A:14-147 -- 14-151. State law confers on full-time municipal police officers the full power of arrest for any crime committed in their presence in the territorial limits of New Jersey. §40A:14-152.1. Police officers exercising police

powers outside the territorial limits of the municipality which employs them are granted the same statutory immunity from suit as they have within that community. §40A:14-152.2. State law mandates attendance at and regulates the content of training courses for municipal policemen. 52:17B-66--17B-77.3; N.J. Admin. Code tit. 13, §§1-1.1--1-11.12. Under the common law New Jersey police officers are considered to be municipal officers as distinguished from other municipal employees, and thus, except as modified by legislation, subject to the "no work no pay rule," and the residency rule applicable to public officers. See Township of Springfield v. Pedersen, 73 N.J. 1, 5-6, 372 A.2d 286, 288 (1977); Trainor v. City of Newark, 145 N.J. Super. 466, 473-74, 368 A.2d 381, 385 (App.

Div. 1976), certif. denied, 74 N.J. 255, 377 A.2d 661 (1977).

Acting pursuant to the authority delegated by the legislature, the governing body of Washington Township has adopted detailed regulations for the government and discipline of its police force, of which we take judicial notice. Fed. R. Evid. 201(b), (f). Those in effect at the time the challenged plan was adopted were enacted pursuant to Washington Township Ordinance No. 39-1974 and Resolution No. 105-1974. The ordinance authorized the Township Committee "from time [to time] to make and establish, amend or repeal, by resolution or ordinance, such rules and regulations, not inconsistent with the laws of this state or the ordinances of the township, for the government and control of

the members of the Police Department, as may be deemed expedient and proper to carry out the objects of this ordinance and with the view to making the Police Department and all of the officers and members thereof efficient, vigilant, prompt and useful to the township." Ordinance No. 39-1974, § 19-4. The powers and duties of police officers are specified in section 19-5. These include the power and duty

> to keep order in all public places of this township; to prevent, restrain and suppress any riot, row, disturbance, disorderly assembly or breach of the peace . . ., to restrain vagrants, mendicants and street bargainers; and to require any persons unnecessarily congregated upon the sidewalks or corners of the street to disperse, and if they refuse, to arrest them. . . .

Section 19-5 also provides that members of the Police Department shall devote full time and attention to the service of the

Department, and although hours are allotted for the performance of regular tours of duty, "officers are considered at all times available for duty and must act promptly at any time their services are required, except when on authorized leave or in the event of disability." The ordinance cross-references to Department Rules and Regulations, the current version of which was adopted by Resolution No. 105-1974. This 72 page manual in a forward states:

> The success of a police department in the performance of its duties is largely measured by the degree of support and cooperation it receives from the people of the community which it serves. It is of paramount importance that we secure the confidence, respect, and approbation of the public. The cultivation of such desirable attitudes is dependent upon proper performance of duty by all the members of the department.

Chapters 1 and 2 of the regulations set forth the organizational structure of the

Department, which in broad terms may be described as quasi-military. Chapter 3 sets forth General Rules and Regulations; Chapter 4, Personnel Regulations; and Chapter 5, Disciplinary Regulations. Among the General Rules and Regulations, those particularly relevant to the question whether police officers may have lowered expectations of privacy because they have chosen to enter a highly regulated industry include:

> 3:1.1 Standard of Conduct. Members and employees shall conduct their private and professional lives in such a manner as to avoid bringing the department into disrepute.
>
> 3:1.6 Duty Responsibilities. Members of the department are always subject to duty although periodically relieved of its routine performance.
>
> They shall, at all times, respond to the lawful orders of superior officers and other proper authorities as well as calls for police assistance from citizens. Proper police action

must be taken whenever required. The administrative delegation of the enforcement of certain laws and ordinances to particular units of the department does not relieve members of other units from the responsibility of taking prompt, effective police action within the scope of those laws and ordinances when the occasion so requires. Members assigned to special duties are not relieved from taking proper action outside the scope of their specialized assignment when necessary.

3:1.26 Debts - Incurring and Payment

(D) Members and employees shall pay all just debts and legal liabilities incurred by them.

3:1.27 Intercession -- Soliciting. Members and employees shall not solicit anyone to intercede with the Chief of Police, Mayor, or members of the Township committee in relation to promotion assignments, disposition of pending charges, or findings in a department trial or other related matter.

3:1.28 Persons and Places of Bad Reputation. Member [sic] and employees shall not frequent places of bad reputation, nor associate with persons of bad reputation, except as may be required in the course of police duty.

3:1.19 Withholding Information. Members and employees shall not, at any time, withhold any information concerning criminal activity.

3:1-30 Reporting Violations of Laws, Ordinances, Rules or Orders. Members and employees knowing of other members or employees violating laws, ordinances, or rules of the department, or disobeying orders, shall report same in writing to the Chief of Police through official channels. If the member or employee believes the information is of such gravity that it must be brought to the immediate personal attention of the Chief of Police, official channels may be bypassed.

3:2.2 Alcoholic Beverages and Drugs.

(A) No member or employee of the department will appear for or be on duty under the influence of liquor or drugs or be unfit for duty because of their excessive use.

(B) Members or employees of the department shall not drink any kind of intoxicating beverage while on duty or take any drugs not duly prescribed and necessary for health at any time.

(C) Employees of the department shall refrain from drinking intoxicating beverages for a period of at least four (4) hours before going on duty.

(D) No member of the department shall, at any time when in uniform, except in the performance of duty, enter any place in which intoxicating liquor is served.

(E) Intoxicating beverages may not be consumed at any police station.

(F) Members and employees shall not bring into or keep any intoxicating liquor or drugs on department premises except when necessary in the performance of a police task. Liquor or drugs brought into department premises in the furtherance of a police task shall be properly identified and stored according to department policy.

3:2.5 Physical Fitness For Duty. Members shall maintain good physical condition so that they can handle the strenuous physical contact often required of a law enforcement officer.

3:2.6 Loitering. Members on duty or in uniform shall not enter theatres or other public places except to perform a police task. Loitering and

unnecessary conversation in such locations are forbidden. Members and employees off duty and not on any official standby shall not loiter in police department areas.

3:2.7 Smoking While on Duty. Members shall not smoke on duty while in direct contact with the public nor when in uniform in public view, except that smoking is permitted in public view at mealtimes and while patrolling in police automobiles at which times it shall be as inconspicuous as possible.

* * *

3:3.1 Regulation Uniforms Required. All members shall maintain regulation uniforms. Uniforms shall be kept neat, clean, and well-pressed at all times.

3:3.2 Manner of Dress On Duty. Normally members will wear the duty uniform on a tour of duty; however, commanding officers may prescribe other clothing as required by the nature of the duty which a particular member is assigned. Employees will wear and maintain an employee uniform when so directed by the Chief of Police.

3:3.3 Wearing or Carrying Badge or I.D. Card. A member, when in uniform, shall wear the regulation

badge on the outside of the outermost garment over the left breast and always in sight. When not in uniform or off duty, he shall carry his badge or I.D. Card in his pocket.

3:3.4 Wearing of Name Badge. A member, when in uniform, shall wear the regulation name badge on his uniform shirt or dress jacket, whichever is outermost, in accordance with department instructions.

* * *

3:3.8 Carrying Equipment Off Duty. When off duty, each member will carry or have in his immediate possession, his badge, department revolver, or a pistol or revolver of not less than .32 caliber as authorized by the department, and the identification card. This rule shall not apply when members are engaged in sports and activities of such a nature as to make it impractical.

3:3.9 Civilian Clothing--Manner of Dress. Male members and employees permitted to wear civilian clothing during a tour of duty shall wear either a business suit or sport coat with slacks. A dress-type shirt with tie shall be worn. Commanding officers may prescribe other types of clothing when necessary to meet a particular police objective. Female members and employees permitted to

wear civilian clothing shall conform to standards normally worn by office personnel in private business firms, unless otherwise directed.

* * *

3:3.12 Personal Appearance. Every member and employee of the department, while on duty, must at all times be neat and clean in person, his clothes clean and pressed, and his uniform in conformity with the rules and regulations. He shall, as often as necessary, examine and clean his equipment and keep it always in good serviceable condition. Male members and employees shall conform to the following additional standards of appearance:

(A) Hair shall be evenly trimmed at all times while on duty. The hair shall at no point extended downward over the shirt collar in normal posture.

(B) Sideburns shall not extend below the bottom of the ear. The maximum width at the bottom of the sideburns shall not exceed 1 3/4 inch.

(C) A clean-shaven appearance is required except that mustaches are permitted. Mustaches shall be neatly trimmed and shall not extend

more than 1/2 inch beyond the corners of the mouth nor more than 1/4 inch below the corners of the mouth. Remainder of the face shall be clean shaven.

(D) Beards shall not be permitted.

(E) Personnel with a medical condition which precludes shaving shall be required to present a written statement, signed by a medical doctor, verifying such condition.

* * *

3:8.3 Use of Derogatory Terms. Members and employees shall:

(A) Neither speak disparagingly of any race or minority group nor refer to them in insolent or insulting terms of speech, whether prisoners or otherwise.

(B) Neither use uncomplimentary terms of speech when referring to any prisoner or other person nor willfully antagonize any person with whom he comes in contact.

* * *

3:10.1 Conduct Toward the Public. Members and employees shall be courteous and orderly in their

dealings with the public. They shall perform their duties quietly, avoiding harsh, violent, profane, or insolent language and shall always remain calm regardless of provocation. Upon request, they are required to supply their names and badge numbers in a courteous manner. They shall attend to requests from the public quickly and accurately, avoiding unnecessary referral to other parts of the department.

3:10.2 Impartial Attitude. All members, even though charged with vigorous and unrelenting enforcement of the law, must remain completely impartial toward all persons coming to the attention of the department. VIolations of the law are against the people of the state and not against the individual officer. All citizens are guaranteed equal protection under law. Exhibiting partiality for or against a person because of race, creed, or influence is conduct unbecoming an officer. Similarly, unwarranted interference in the private business of others when not in the interests of justice is conduct unbecoming an officer.

3:10.3 Disparaging Nationality, Race, or Creed. Courtesy and civility toward the public is required of all member of the department. Members shall not use words which humiliate, disparage,

demean, degrade, ridicule, or insult a person because of his race, creed, color, national origin, or ancestry.

3:10.8 Commercial Testimonials. Members and employees shall not permit their names or photographs to be used to endorse any product or service which is in any way connected with law enforcement without the permission of the Chief of Police. They shall not, without the permission of the Chief of Police, allow their names or photographs to be used in any commercial testimonial which alludes to their positions or employment with the department.

3:10.9 Public Appearance Requests. All requests for public speeches, demonstrations, and the like, will be routed to the Chief of Police for approval and processing. Members and employees directly approached for this purpose shall suggest that the party submit his request to the Chief of Police.

Among the Personnel Regulations one, bearing particularly on the police officer's diminished lowered expectation of privacy, reads:

4:1.1 (G) He shall submit to and pass such physical examination as may be

prescribed by the Chief of Police with the approval of the Township Committee.

(H) He shall submit to and pass such written, oral, psychiatric, physiological, or performance evaluation tests as are prescribed by the Chief of Police with the approval of the Township Committee.

These statutes and regulations speak for themselves. They establish that the police industry is probably the most highly regulated, with respect to performance of its employees, of any industry in New Jersey. When compared with the history of regulation held in Shoemaker to be sufficient for application of the administrative search exception, the occupation of police officer is far more intensely regulated. The Washington Township police officers are members of quasi-military organizations, called upon for duty at all times, armed at

almost all times, and exercising the most awesome and dangerous power that a democratic state possesses with respect to it residents -- the power to use lawful force to arrest and detain them. The need in a democratic society for public confidence, respect and approbation of the public officials on whom the state confers that awesome power is significantly greater than the state's need to instill confidence in the integrity of the horse racing industry. The plaintiffs' efforts to distinguish Shoemaker are unavailing. That case controls, and requires the reversal of the summary judgment in their favor. Plaintiffs' remaining arguments simply dispute the Shoemaker precedent. This panel is not free, however, to disregard

it.[6]

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[6] Other courts have followed it. See, e.g., National Treasury Employees Union v. Von Raab, 816 F.2d 170, 179-80 (5th Cir. 1987) (analogizing Customs Service to highly regulated industry), cert., granted, 108 S. Ct. 1072 (1988); McDonnell v. Hunter, 809 F.2d 1302, 1308 (8th Cir. 1987) (correctional officers); Rushton v. Nebraska Pub. Power Dist., 653 F. Supp. 1510, 1524-25 (D. Neb. 1987) (nuclear power plant employees). But see e.g., Railway Labor Executive's Ass'n v. Burnley, 839 F.2d 575, 585 (9th Cir. 1988) (distinguishing Shoemaker); American Fed'n of Gov't Employees v. Weinberger, 651 F. Supp. 726, 734-35 (S.D. Ga. 1986) (distinguishing and criticizing Shoemaker); Fraternal Order of Police, Newark Lodge No. 12 v. City of Newark, 216 N.J. Super. 461, 469, 524 A.2d 430, 434-35 (App. Div. 1987) (distinguished Shoemaker, but did not reach federal constitutional issue); Caruso v. Ward, 133 Misc. 2d 544, 506 N.Y.S.2d 789, 798 (N.Y. Sup. Ct. 1986) (distinguishing Shoemaker), aff'd, 131 A.D.2d 214, 520 N.Y.S.2d 551 (N.Y. App. Div. 1987).

III.

The parties are in agreement that there are no material issues of disputed fact. On the present record the Township is entitled to a judgment in its favor on the plaintiffs' Fourth Amendment claim. The district court did not address the plaintiffs' contention that the plan also violated Article I, paragraphs 1, 2 and 7 of the New Jersey Constitution. We express no view on the question whether the New Jersey Constitutional provisions on which the plaintiffs rely would afford greater protection from random or universal mandatory urinalysis of police officers than does the Fourth Amendment.[7/] The

---

[7/] See Fraternal Order of Police, Newark Lodge No. 12 v. City of Newark, 216 N.J. Super. 461, 477, 524 A.2d 430, 438-39 (App. Div. 1987).

judgment appealed from will be reversed and the case remanded for further proceedings consistent with this opinion.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-5793

POLICEMEN'S BENEVOLENT ASSOC.
OF NEW JERSEY, LOCAL 318,
Appellees

v.

TOWNSHIP OF WASHINGTON,
Appellant

SUR PETITION FOR REHEARING

Present: GIBBONS, Chief Judge, SEITZ, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, AND COWEN, Circuit Judges.

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service,

and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

_____
Chief Judge

Dated: July 28, 1988

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-5793

POLICEMAN'S BENEVOLENT ASSOCIATION OF NEW JERSEY, LOCAL 318 and EDMUND GIORDANO, Individually, and as President of the Policeman's Benevolent Association of New Jersey, Local 318

v.

TOWNSHIP OF WASHINGTON (Gloucester County), a Municipal Corporation Under the Laws of New Jersey, JOHN ROBERTSON, Mayor, DANIEL MANGINI, MARGARET SMITH, RICHARD MARSELA, and VIRGINIA WEBER, Council Members

Township of Washington and John Robertson, Mayor, Appellants

(D.C. Civil No. 86-3525)
ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Present: GIBBONS, Chief Judge, MANSMANN and COWEN, Circuit Judges

J U D G M E N T

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel May 3, 1988.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered October 8, 1987, be, and the same is hereby reversed and the cause remanded to the said District Court for further proceedings consistent with the

opinion of this Court. Costs taxed against the appellees.

ATTEST:

Sally Mrvos,
Clerk

June 21, 1988

Certified as a true copy and issued in lieu of a formal mandate on August 5, 1988

Test:

Chief Deputy Clerk, United States Court of Appeals, for the Third Court

Supreme Court, U.S.
FILED
DEC 22 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-706

In the
Supreme Court of the United States
October Term, 1988

POLICEMEN'S BENEVOLENT ASSOCIATION OF NEW JERSEY, LOCAL 318, and EDMUND GIORDANO, individually and as president of Local 318,

Petitioners,

v.

TOWNSHIP OF WASHINGTON, and JOHN ROBERTSON, Mayor,

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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SUMMARY OF ARGUMENT

The Washington Township police force is intensely regulated, such regulation focusing on the conduct of police officers. This pervasive regulation creates a reduced expectation of privacy which justifies application of the administrative search exception, as held by the court below. Random and regular drug testing is needed to serve the important state interest of assuring that the police force be unimpaired by drug usage. The plan developed by Washington Township is comprehensive and provides adequate notice to police officers that testing will occur. The plan further places adequate limits upon the discretion of officials involved in the testing. The intrusion involved in drug testing is minimal, and application of the administrative search exception in this context is justified, and is not contrary to the precedents of this Court.

ARGUMENT

I. The Third Circuit Correctly Ruled That The Police Department Was A Pervasively Regulated Industry Sufficient To Fall Within The Administrative Search Exception To The Fourth Amendment.

Petitioners' first contention is that the Third Circuit erred in holding that the police department was a pervasively regulated industry and in applying the requirements necessary to fall within the administrative search exception to the Fourth Amendment. These matters merely constitute the lower court's application of standards developed by this Court to the facts of this particular case. There is no reason or need for this Court to review the Circuit Court's application of such standards to a given set of facts.

In any event, the decision below was clearly correct. In applying the administrative search exception to the drug testing of police officers, the Third Circuit followed its prior ruling in *Shoemaker v. Handel*, 795 F.2d 1136 (3d Cir. 1986), *cert. denied*, 107 S.Ct. 577, where it upheld drug testing of jockeys in light of the highly-regulated nature of horse racing. The court concluded that the police force is more highly regulated, with respect to employee performance, than any industry in the state, and characterized the Washington Township police force as a quasi-military organization (121a).[1]

Petitioners seek to equate the police department with municipal employees in general, contending that police officers are simply subject to the same regulations as apply generally to other public employees. However, the court below relied upon the unique and pervasive regulatory system which in fact governs the police department in question. Police officers are deemed available for duty at all times and are expected to act whenever needed unless disabled or on authorized leave. Washington Township Ordinance 39-1974, Sec. 19-5 (109a-110a). Police officers are subject to extensive regulation concerning their general conduct and appearance while

[1] References are to the Appendix of Petitioners.

on and off duty, including: their manner of dress, grooming, physical fitness; the required carrying of firearms on and off duty; their payment of debts; their use of alcohol, drugs, and smoking; their general standards of conduct and their treatment of others; their involvement in public appearances and commercial testimonials; and their association with persons of ill repute and frequenting of places of ill repute. Washington Township Resolution No. 105-1974, Department Rules and Regulations, chapter 3 (111a-120a). Chapter 4 of the cited rules (120a-121a) contains a particularly relevant provision as follows:

> 4:1.1 (G) He shall submit to and pass such physical examination as may be prescribed by the Chief of Police with the approval of the Township Committee.
>
> (H) He shall submit to and pass such written, oral, psychiatric, physiological, or performance evaluation tests as are prescribed by the Chief of Police with the approval of the Township Committee.

Clearly then, the Washington Township police force is subject to far more extensive regulation than are municipal employees in general. The court below correctly found the police officers to be subject to such pervasive regulation as to create a reduced expectation of privacy. Petitioners are simply incorrect in claiming that the ruling below creates an exception so broad that it swallows all Fourth Amendment protection accorded public employees. The ruling below is limited to the police force and is based upon the unique and pervasive regulation of police officers as employees.

The administrative search exception may be applied: (1) where there is a substantial governmental interest at stake; (2) where the searches are necessary to serve the regulatory scheme; and (3) where the program, in terms of certainty and regularity of application, provides a constitutionally adequate substitute for a warrant. *New York v. Burger*, 107 S.Ct. 2636, 2644 (1987). These standards are met in the present case. Petitioners incorrectly claim that the court below ignored these factors in the present case. The court found its prior ruling in *Shoemaker* to be controlling. *Shoemaker* analyzed the third factor at some length in upholding the drug testing of jockeys. 795 F.2d at 1142-1143. The court below found

that the plan herein contained essentially the same protections as it had upheld in *Shoemaker* (100a). The court below also discussed the important state interest at stake (101a).

The state interest in preventing drug usage among the police force is more than substantial, it is compelling. The effectiveness of the police department will depend in large part on the degree of confidence and respect reposed by the public in the members of the force. Moreover, police officers are frequently involved in dangerous activity and are called upon to resolve life-threatening crises. They are authorized to use force, including deadly force, where appropriate, and to engage in high-speed chases. They are required to carry firearms both on and off duty. Few state interests could be more compelling than to assure the effectiveness and fitness of the police force, and to assure that the judgment and reflexes of police officers be unimpaired by drug usage.

Petitioners assert that no evidence of actual drug problems among the Washington Township police force was presented. Such a showing is unnecessary. In *New York v. Burger*, 107 S.Ct. at 2646-2647, this Court relied upon the general societal problem of automobile theft to demonstrate a substantial interest in regulating automobile junkyards. Drug usage is a pervasive problem nationwide. A recent NIDA study shows that among employed 20-40 year olds nationwide, 29% reported use of illegal drugs in the past year, and 19% reported some illegal drug use at least once in the last month. Among young adults age 18-25, the numbers are even higher, 42% reported using illegal drugs in the past year. Overall, 70.4 million Americans age 12 and over (37% of the population) have used marijuana, cocaine or other illegal drugs during their lifetime. *National Institute on Drug Abuse, Highlights of the 1985 National Household Survey on Drug Abuse.* (November 1986).

Because drug usage is engaged in privately and secretly, documentation of the extent of the problem among a particular police force is impossible without testing. Certainly, the extent of the problem nationwide justified Washington Township in taking steps to detect, prevent, and deter the problem. Particularly in the context of law enforcement, where the potential for tragedy is obvious and substantial, the Township need not await a disaster, so that it can demonstrate an actual drug problem, before taking steps to prevent the problem.

Petitioners also contend that there is no need for random testing and regular testing, and that the less intrusive measure of observing officers for signs of impairment before testing is adequate. First, close observation is impractical. Police officers frequently work alone and unsupervised — continuous supervision is unrealistic, and would greatly interfere with effective police work. Moreover, police officers are expected to respond when needed during their off duty hours, at which times there is no supervision at all.

More important, drug usage is not easily detected, and the outward signs of impairment, particularly in the early stages of usage, are often nonexistent, or at best, subtle. As the Eighth Circuit has observed: "[i]t is the insidious nature of these substances that too often the user's faculties are impaired and the damage done through a serious error on his part **before** he realizes he is impaired and without any outward sign that could lead a supervisor or other person to intervene." *Brotherhood of Maintenance of Way Employees v. Burlington Northern Ry.*, 802 F.2d 1016, 1020 (8th Cir. 1986) (emphasis supplied). In the case of police officers, the first outward manifestation of impairment could well consist of an error resulting in injury or death to a citizen, to a fellow officer, or to the officer himself.

Observation is clearly inadequate, and testing at random and on a regular basis is necessary to effectuate the compelling interest of assuring an unimpaired police force. Random and regular testing is not intended simply to identify those officers with a serious drug problem. An important and perhaps primary goal is preventative. A police officer with no existing drug problem will think twice before engaging in what may start as experimental or recreational drug usage, if faced with the prospect of random testing. Such deterrence is not provided with the mere observation of an officer's on-duty performance. Certainly, the Township has a strong interest in deterring and preventing drug problems before they develop.

Petitioners finally contend that the random nature of the testing demonstrates that it is not subject to sufficient standards to substitute for a warrant. This Court has held that a scheme is adequate so long as it is sufficiently comprehensive and defined that the person in question cannot help but be aware that he will be subjected to periodic searches for specific purposes. *Donovan v. Dewey*, 452 U.S. 594, 600 (1981), and so long as it contains

adequate standards to limit the discretion of persons responsible for the searches. *New York v. Burger,* 107 S.Ct. at 2644. The plan herein satisfies both standards.

First, the plan was announced well in advance of implementation, giving every officer notice that testing would occur. The plan is comprehensive, and details have been promulgated in writing, and are available to all employees. An annual medical exam to be given each employee is to be scheduled, and is to include a urinalysis test (11a). Subjects of random testing are to be selected by computer, with computer programming to be done by an independent contractor (12a). The testing itself is to be done by medical personnel from a testing laboratory hired by the Township, subject to detailed specifications. Clearly, discretion in Township officials is narrowly circumscribed, and the plan provides a constitutionally adequate substitute for a warrant. All of the requirements for the administrative search exception are met in this case.

II. The Administrative Search Exception May Properly Be Applied To Drug Testing.

Petitioners contend that application of the administrative search exception to drug testing is unwarranted because the exception has previously been utilized by this Court only in the context of searches of premises. However, even as to medical procedures which intrude below the skin, the applicable test under the Fourth Amendment is whether the privacy interest of the individual is outweighed by the societal interest in conducting the procedure. *Winston v. Lee,* 470 U.S. 753, 760 (1985). This Court has held that blood testing does not represent an unduly extensive imposition upon an individual's personal privacy and bodily integrity, in light of the commonplace nature of blood tests and the fact that such a test presents virtually no risk, trauma or pain. *Winston,* 470 U.S. at 761-762; *Schmerber v. California,* 384 U.S. 757, 771 (1966).

Likewise, urine testing is commonplace and routine for anyone who has regular medical examinations, including persons required to have medical exams in connection with their employment. Employment-related medical exams are quite common, particularly in a field such as police work, where physical fitness is a job

prerequisite. The procedure does not intrude below the skin, and is even safer and less traumatic than a blood test. The Washington Township plan permits the urination to occur unobserved, unless there is cause to suspect tampering (13a). The procedure is simply not an extraordinary invasion of one's privacy and security.

Drug testing by employers is becoming increasingly common throughout the country. Private employers are not subject to Fourth Amendment strictures, and employees in the private sector have therefore become increasingly accustomed to the use of drug tests. In *O'Connor v. Ortega,* 107 S.Ct. 1492, 1499 (1987) (plurality opinion), this Court observed that the privacy expectations of public employees, "like similar expectations of employees in the private sector, may be reduced by virtue of actual office practices and procedures, or by legitimate regulation." In his concurring opinion, Justice Scalia concluded that searches by a public employer do not violate the Fourth Amendment when they are "of the sort that are regarded as reasonable and normal in the private-employer context". 107 S.Ct. at 1506 (Scalia, J., concurring).

To permit drug testing of public employees is merely to place them on the same footing as private employees, and can hardly be deemed an unusual or unreasonable intrusion. In *Abood v. Detroit Board of Education,* 431 U.S. 209, 229 (1977), this Court held that the First Amendment rights of public employees are no weightier than that of private employees, and concluded that "[p]ublic employees are not basically different from private employees." Likewise, in the context of drug-testing, public employees should not be held to have a greater expectation of privacy than do private employees.

Clearly, police officers have no legitimate expectation of privacy in the result of the testing, i.e., in whether they use illegal drugs. According to this Court in *United States v. Jacobsen,* 466 U.S. 109, 122-123 (1983):

> The concept of an interest in privacy that society is prepared to recognize as reasonable is, by its very nature, critically different from the mere expectation, however well justified, that certain facts will not come to the attention of the authorities...
>
> A chemical test that merely discloses whether or not

> a particular substance is cocaine does not compromise any legitimate interest in privacy.
>
> [footnote omitted].

Petitioners complain that urinalysis can reveal other private facts. However, under the Plan, testing is to be done and results are to be reported only for specific illegal drugs designated by the Township (14a).

The administrative search exception is based upon the lowered expectation of privacy held by persons who voluntarily enter a heavily regulated business. *Donovan v. Dewey*, 452 U.S. 594, 598-599 (1981); *New York v. Burger*, 107 S.C5. 2636, 2642-2643 (1987). The prior cases of this Court have involved the search of business premises because the regulatory schemes in question have focused upon the conducting of the business. In *Shoemaker v. Handel*, 795 F.2d 1136, 1142 (3d Cir. 1986), *cert. denied*, 107 S.Ct. 577, where the court applied the exception to breath and urine testing of jockeys, the court observed:

> Consequently, while there are distinctions between searches of premises and searches of persons, in the intensely-regulated field of horse racing, where **the persons engaged in the regulated activity are the principal regulatory concern**, the distinctions are not so significant that warrantless testing for alcohol and drug use can be said to be constitutionally unreasonable. We therefore hold that the administrative search exception applies to warrantless breath and urine testing of employees in the heavily regulated horse-racing industry.
>
> [emphasis added].

Similarly, in this case, the police officers themselves are the focus of the regulatory scheme. Upon entering the police department, all officers know that they will be subjected to extensive regulation, including regulation of matters of a highly personal nature, unlike any standards which apply to employees in general. Most significantly, they know that they will be expected to submit to physical exams and psychiatric and physiological testing as directed.

In short, the regulatory scheme is focused on the person and creates a lowered expectation of privacy as to one's person, as opposed to one's property or premises. Upon voluntarily entering the police force, an officer thereby consents to become subject to extensive regulation of his conduct and of his person. Under such circumstances, a urine test does not pose a substantial distinction from the premises searches which have been upheld by this Court in applying the administrative search exception.

III. The Ruling Below Does Not Conflict With The Ruling In *O'Connor V. Ortega*

The ruling below is in no way inconsistent with this Court's ruling in *O'Connor v. Ortega,* 107 S.Ct. 1492 (1987) (plurality opinion). First, that case did not involve drug testing, and the plurality opinion specifically noted that the Court was not addressing the proper standard to be applied in the drug testing context. 107 S.Ct. at 1504. Rather, *O'Connor* involved the search of the office of a state hospital employee. This Court ruled that public employees do not lose their Fourth Amendment rights in the workplace; however, the court below never suggested the contrary in the present case. The court below simply concluded that in the specific context of drug testing of police officers, there was a sufficiently reduced expectation of privacy to justify random and regularly scheduled testing.

In fact, the plurality opinion in *O'Connor,* as well as the concurring opinion of Justice Scalia, concluded that warrantless searches of employee offices are proper, subject to a test of reasonableness, for employment-related searches. The plurality held that for some employee offices, there would be no legitimate expectation of privacy at all. 107 S.Ct. at 1498. When such expectation did exist, neither a warrant nor probable cause would be required for a work-related search (defined to include both non-investigatory and investigatory work-related employee misconduct searches). 107 S.Ct. at 1500–1502. Rather, the propriety of such searches was to be judged solely on the basis of reasonableness under the circumstances, and the Court left undetermined whether such standard even included a need for "individualized suspicion" before a search

was justified. 107 S.Ct. at 1502-1503. The concurring opinion of Justice Scalia differs from the plurality by concluding that all employee offices should be subject to the test of reasonableness, instead of being subjected initially to a case-by-case determination of whether there is legitimate expectation of privacy in the first instance. 107 S.Ct. at 1505-1506.

Thus, even for ordinary governmental employees, this Court has not foreclosed the possibility of random or regularly scheduled searches. Similarly, in *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), where the Court upheld warrantless searches, without requiring probable cause, in the context of searching the purse of a high school student, the Court adopted a test of reasonableness and declined to determine whether a showing of individualized suspicion was required, suggesting that some circumstances "might justify school authorities in conducting searches unsupported by individualized suspicion." 469 U.S. at 342, n. 8. In *United States v. Martinez-Fuerte*, 428 U.S. 543, 561 (1976), the Court upheld routine stops at checkpoints near the border, reasoning that a quantum of individualized suspicion is not an "irreducible requirement" of the Fourth Amendment.

In the context of standardized inventory searches, done for administrative reasons rather than for criminal investigation, this Court has consistently judged such searches under a standard of reasonableness, without requiring any showing of individualized suspicion. *Colorado v. Bertine*, 107 S.Ct. 738, 741 (1987); *Illinois v. Lafayette*, 462 U.S. 640 (1983). The Court has not even required in such context that the least intrusive means be used, concluding that reasonableness does not necessarily turn on the existence of less intrusive alternatives. 462 U.S. at 647. Clearly then, this Court has never held that searches without a showing of reasonable suspicion are violative of the Fourth Amendment in all cases except the narrowly construed administrative search cases the Court has already recognized. Rather, the prior rulings of this Court hold that, outside the context of criminal investigation,[2] reasonableness is the relevant test, and the Court has not ruled that individualized suspicion is a necessary component of reasonableness.

---

[2] Petitioners contend that the plan does not prevent use of the test results for criminal prosecutions. In fact, the plan specifically provides that testing is not to be done to collect evidence for use in criminal proceedings (15a).

In fact, the plurality opinion in *O'Connor* describes the invasion of privacy involved in the search of an employee's office as being relatively limited, comparable to that involved in an administrative search case. 107 S.Ct. at 1502. In the present case, the court below found a lowered expectation of privacy in the context of drug testing of police officers, based upon the pervasive regulatory scheme applicable to their employment. There is nothing in the *O'Connor* ruling which forecloses or even questions such a result. The ruling below in no way conflicts with the previous rulings of this Court, and review is therefore unnecessary.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be denied.

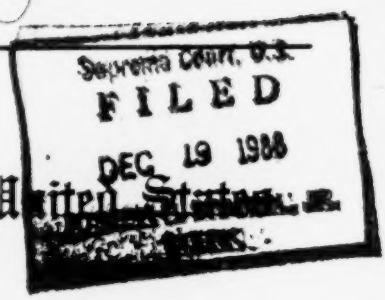
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Dated: December 19, 1988

No. 88-706



In The

Supreme Court of the United States

October Term, 1988

POLICEMEN'S BENEVOLENT ASSOCIATION OF NEW JERSEY, LOCAL 318 AND EDMUND GIORDANO, individually and as President of Local 318,

Petitioners,

vs.

TOWNSHIP OF WASHINGTON and JOHN ROBERTSON, Mayor,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF AMICUS CURIAE, NEW JERSEY STATE PATROLMEN'S BENEVOLENT ASSOCIATION

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Argument:

The intrusive and demeaning searches of police officers through random urinalysis, without a warrant, probable cause or any reasonable or individualized suspicion, is a violation of the Fourth and Fourteenth Amendments. 8

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Fifth Amendment 12

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No. 88-706

In The

Supreme Court of the United States

October Term, 1988

POLICEMEN'S BENEVOLENT ASSOCIATION OF NEW JERSEY, LOCAL 318 AND EDMUND GIORDANO, individually and as President of Local 318,

Petitioners,

vs.

TOWNSHIP OF WASHINGTON and JOHN ROBERTSON, Mayor,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF AMICUS CURIAE, NEW JERSEY STATE PATROLMEN'S BENEVOLENT ASSOCIATION

INTEREST OF AMICUS CURIAE

The New Jersey State Patrolmen's Benevolent Association (hereinafter "State PBA") is the primary fraternal and collective bargaining organization for law enforcement officers in the State of New Jersey. In its role as an economic organization, it constitutes the parent body of local PBAs which serve as collective bargaining representatives for the vast majority of police officers in New Jersey. In its fraternal capacity, the State PBA also functions as a lobbying and professional organization to protect and advance the interests of police officers throughout the State of New Jersey. Simply stated, the State PBA is the predominant professional and economic representative for police officers in New Jersey, and its goal and purpose is to serve their professional and economic interest. In this regard, it is important to note that the State PBA is the parent organization for the Washington Township PBA Local 315, the petitioner in this case.

As part of this process, and throughout its history, the State PBA has involved itself in, and taken positions on, legal matters and judicial proceedings which are of fundamental importance to police officers in this state. This has included both funding local associational actions, as well as direct participation in pending court proceedings. In numerous cases the State PBA has presented to the judiciary its position on various legal issues of import or concern to police officers or the law enforcement community. Often this involvement has been in the form of appearing as an *amicus curiae*. The State PBA wishes to continue to assist this Court in the presentation of the views of police officers, and has submitted to the Clerk of the Court, simultaneous with the filing of this brief, letters of consent by the parties to this action consenting to the appearance of the State PBA as an *amicus curiae*.

The concern of the State PBA in this case is self-evident from a reading of the decision of the Third Circuit Court of Appeals

at issue. As will be indicated more fully, the decision of the Third Circuit, if permitted to stand, authorizes random or periodic "drug testing" of police officers in this state without a warrant and without either probable cause, reasonable suspicion, or any other individualized facts justifying a belief that an officer is using, or is under the influence of, controlled substances. Obviously, as the group which is directly affected by the decision of the Third Circuit Court of Appeals, police officers and the State PBA have a substantial interest in the constitutionality of the regulations of Washington Township, which permit drug testing in the unfettered discretion of the Chief of Police or executive officials of the Township.

For these reasons, the State PBA respectfully submits this brief as an *amicus curiae* in this case. This brief is submitted in support of the position of the petitioners Washington Township PBA Local 315 and Edmund Giordano and in opposition to the decision of the Court of Appeals holding the regulatory scheme for drug testing of police officers to be constitutional.

PARTIES

Petitioners in this case are the Policemen's Benevolent Association of New Jersey Local 318 and Edmund Giordano, the President of that organization. PBA Local 318 is the collective bargaining representative of all police officers employed in the Township of Washington.

Respondents are the Township of Washington, a municipal corporation, and John Robertson, the mayor of the municipality. The New Jersey State Patrolmen's Benevolent Association ("State PBA") submits this brief as an *amicus curiae* in support of petitioners.

STATEMENT OF THE CASE

A. Facts

The facts of this case are not seriously disputed. Petitioners are the president and the collective bargaining representative for all police officers employed in respondent Washington Township, New Jersey. The respondents are the Township of Washington, a suburban community in southern New Jersey, and its mayor (5a to 6a).[1] On August 5, 1986, Mayor Robertson sent a memorandum to all department heads, including the Police Department, announcing that the Township would begin a mandatory drug testing program (1a-2a). While there was no articulable claim of drug use or drug abuse among any Township employees, and particularly among police officers, the memorandum indicated that the mere fact that drug abuse is a statistically significant problem in the United States was sufficient to justify a program of random drug testing. The announcement contained no guidelines or procedures as to how the testing program would be conducted.

On September 12, 1986, the petitioners filed suit in the United States District Court for the District of New Jersey on behalf of Township police officers to obtain injunctive relief. Upon representation by the Township that no drug testing would take place until guidelines were developed, however, injunctive relief was denied and the matter proceeded to discovery (7a).

On February 25, 1987, the Township prepared and submitted a "revised drug testing program of the Township of Washington", which contained the guidelines contested in this suit. The program provides that no individualized suspicion is required before an individual might be required to submit a urine sample for analysis.

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1. ___a refers to appendix of petitioners.

Police officers who are selected randomly under the program will be ordered to urinate in the presence of a government monitor for purposes of analysis of the specimen for the presence of illegal drugs. Prior to the test, an employee must fill out a medical questionnaire listing all drugs, both prescription and non-prescription, which were ingested during the past 30 days. Testing will be performed by a professional laboratory, and any employee testing positive for the presence of any illegal substance is subject to immediate discipline and discharge (9a-18a).

The guidelines also require that every current employee, including all police officers, must submit to an annual urinalysis drug test as part of an annual physical. Neither medical examinations nor fitness for duty tests have ever previously been imposed by the Township. The sole reason for this annual medical examination is to conduct an annual test for drugs, in addition to the random testing which will take place during the calendar year (11a).

B. District Court Decision

Following discovery, the parties made cross-motions for summary judgment before the District Court. In a comprehensive opinion, the District Court held that random drug testing of the Township police officers, in the absence of any reasonable or individualized suspicion to believe drug use had occurred, is a violation of the constitutional rights of those officers (3a-89a). Concluding that urinalysis for purposes of detecting drugs is a "search" within the meaning of the Fourth Amendment, the court concluded that such intrusions into intimate bodily functions, without some individualized suspicion, violated applicable constitutional procedures. The court further concluded that in the absence of any showing of a drug problem among the police force of Washington Township, there was absolutely no basis for subjecting an entirely blameless group of employees to the intrusive and demeaning procedures implicated by government sponsored

urinalysis drug testing (83a). The court accordingly enjoined any implementation of the contested guidelines (87a-88a).

C. Court of Appeals Decision

On appeal, the Third Circuit reversed, concluding that an administrative search exception to the Fourth Amendment exists in certain highly regulated industries, that the Washington Township Police Department is such an "industry", and this conclusion alone justifies complete disregard of both warrant requirements of any form of reasonable individualized suspicion, relying upon *Shoemaker v. Handel,* 795 F.2d 1135 (3rd Cir.), *cert. denied,* 107 S. Ct. 577 (1986) (90a-117a). In *Shoemaker,* the Third Circuit concluded that horse racing is a "highly regulated industry" intensely scrutinized by the public, and that jockeys have a greatly diminished expectation of privacy, diluting the constitutional protection embodied by the Fourth Amendment. Extrapolating these principles and applying them to New Jersey police officers in light of the extensive body of state statutory and regulatory controls which govern them, the court concluded that police work also constitutes a "highly regulated industry" which provides sufficient justification for dispensing with both the warrant requirements of the Fourth Amendment, and any reasonable or individualized suspicion of wrongdoing, before such a highly intrusive search of bodily waste products may be conducted by the state. The Court of Appeals thereafter denied a request for rehearing *en banc* (118a-119a).

D. Proceedings Before This Court

Petitioners thereafter filed their brief and petition for writ of certiorari to the United States Court of Appeals for the Third Circuit. Respondents' brief in opposition, together with any application by *amicus* such as those stated herein, are due, by extension of this Court, on December 19, 1988.

SUMMARY OF ARGUMENT

This case turns on the question of whether Washington Township may randomly test members of its police force for drugs, through mandatory production of urinalysis which is analyzed for the presence of controlled substances, or through mandatory annual physicals required for the same purpose, where there is concededly absolutely no reason to believe that either the members of the Police Department generally, or any individual officer, have either abused or even used illegal drugs. In order to affirm the decision of the Court of Appeals, this Court must conclude that neither a warrant issued by a magistrate, nor even any individual suspicion based upon objective facts, is required before a most intrusive and humiliating government-sponsored program for searching its employees may be implemented.

Amicus New Jersey State PBA, on behalf of over 20,000 active and retired law enforcement officers in this state, contends, as did the District Court, that wholesale abolition of the warrant and/or reasonable suspicion requirement in searching police officers for possible drug use is an impermissible infringement upon Fourth Amendment rights which police officers enjoy. This is particularly true, moreover, in light of the complete absence of any claim that there is a drug abuse problem in the Police Department, or that if there were that it could not be ferreted out by more traditional means which respect basic Fourth Amendment principles. Complete abolition of the protection of the Fourth Amendment, as is effectively the result of the Court of Appeals' decision, constitutes a dangerous and ominous precedent for all public employees generally.

Amicus New Jersey State PBA also contends that an equally distressing aspect of the Third Circuit decision is its conclusion that police officers constitute so highly regulated an industry that constitutional protections against unreasonable searches and

seizures are simply inapplicable to them. In addition to being incorrect factually, the "highly regulated industry" exception carved out by *Shoemaker*, and radically extended by the court below, will ultimately swallow the general rule against unreasonable searches. If the reasoning of the Court of Appeals is accepted, hundreds of thousands of employees in industries which are regulated either by administrative agencies, or state or federal statute, will be drawn within the ambit of random testing for no other reason than the nature of their employment. The serious constitutional questions implicated by such a conclusion warrant review of the decision of the court below.

ARGUMENT

THE INTRUSIVE AND DEMEANING SEARCHES OF POLICE OFFICERS THROUGH RANDOM URINALYSIS, WITHOUT A WARRANT, PROBABLE CAUSE OR ANY REASONABLE OR INDIVIDUALIZED SUSPICION, IS A VIOLATION OF THE FOURTH AND FOURTEENTH AMENDMENTS.

Throughout the history of the United States, the overriding goal of the prohibition against unreasonable searches and seizures guaranteed by the Fourth Amendment to the United States Constitution has been to provide protection to citizens from arbitrary conduct. *Schmerber v. California*, 384 U.S. 757, 16 L. Ed. 2d 908, 86 S. Ct. 1826 (1966). As a general rule, this protection is embodied by the requirement that a search warrant be issued by a neutral magistrate before legitimate expectations of privacy may be invaded. *Katz v. United States*, 389 U.S. 347, 19 L. Ed. 2d 576, 88 S. Ct. 507 (1967); *New Jersey v. TLO*, 469 U.S. 325, 83 L. Ed. 2d 720, 105 S. Ct. 733 (1985); *O'Connor v. Ortega*, ____ U.S. ____, 107 S. Ct. 1492, 94 L. Ed. 2d 714 (1987). Repeatedly this Court has rejected efforts to expand the scope of permissible searches without a warrant, except in instances in

which no other practical alternative exists. Even in those circumstances, moreover, some showing must be made that an articulable, individualized suspicion of wrongdoing is present and sufficient to override protection to a legitimate zone of privacy. *New Jersey v. T.L.O., supra.*

Indeed, this Court has zealously guarded from erosion these protections of the Fourth Amendment even where expediency might otherwise counsel relaxation of the guiding constitutional principles. *Camara v. Municipal Court,* 387 U.S. 523, 18 L. Ed. 2d 930, 87 S. Ct. 1727 (1967); *O'Connor v. Ortega, supra.* While application of these fundamental requirements of the Fourth Amendment may differ in particular circumstances, this Court has never wavered in affirming the constitutional polestar of "reasonableness" before a search may be conducted.

The decision of the Court of Appeals below, however, constitutes a radical departure from these settled principles, and a dangerous extension of the extremely limited circumstances in which this Court has authorized governmental searches where objective indicia of wrongdoing is lacking. *See New York v. Burger,* ____ U.S. ____, 96 L. Ed. 2d 601, 107 S. Ct. 2636 (1987). Merely because of an individual's service and *status* as a police officer, the court concluded that intrusive, demeaning, arbitrary and constitutionally suspect invasions of privacy are acceptable. *Amicus* submits that the decision of the Court of Appeals, if left undisturbed, significantly erodes the protections historically afforded by the Fourth Amendment.

The court below does not dispute that compulsory urinalysis for analysis for the presence of drugs is a "search" under this Court's precedent. *Schmerber v. California, supra; McDonnell v. Hunter,* 809 F.2d 1302 (8th Cir. 1988); *Jones v. McKenzie,* 833 F.2d 335 (D.C. Cir. 1987). Nor is there any intimation by the court (indeed, Washington Township does not even allege) that there is any reason to believe that a drug problem exists within

the police force which might trigger the need for extraordinary measures to ferret out possible substance abusers. Instead, the court suggests that this search simply stands outside the ambit of traditional Fourth Amendment protections pursuant to this Court's precedent concerning administrative search exceptions for commercial enterprises. *New York v. Burger, supra; Marshall v. Barlow's, Inc.*, 436 U.S. 307, 56 L. Ed. 2d 305, 98 S. Ct. 1816 (1978). Concluding that police officers work in such a "highly regulated industry" that their expectations of privacy when performing intimate bodily function are diminished to the point of non-existence, the Court of Appeals determined that warrantless searches of police officers, even where no individualized suspicion of wrongdoing exists, is constitutionally acceptable.

The court erroneously justifies its result through reliance upon the fact that police work is subject to a variety of governmental and regulatory rules and procedures. The Court of Appeals notes that regulation, among other things, of hours of employment of police officers, their salaries, their attendance at mandatory training programs, their obligation to perform their duties effectively, and regulation of their manner of dress on duty indicate that police work is so "highly regulated" that Fourth Amendment protections against unreasonable searches and seizures effectively do not apply (101a-115a). The court simply concluded that "the police industry is probably the most highly regulated, with respect to performance of its employees, of any industry in New Jersey" (115a), and that solely and exclusively because of this purported regulatory saturation, constitutional protections against unreasonable searches and seizures are unavailable to municipal police officers in Washington Township. In short, the Court of Appeals effectively presumes that the decision to chose law enforcement as a career, with consequent governmental regulation of that employment, warrants the conclusion that police officers have forfeited any expectation of privacy.

The profound errors committed by the Court of Appeals in

this analysis, and the ominous impact that this will have not only on police officers but any regulated profession, should be obvious. First of all, a number of regulatory provisions governing police work cited by the court below apply to virtually all employees, whether public or private. It is common, indeed traditional, for hours of work, minimum qualifications for employment, residency requirements, manner of dress, on-the-job conduct, prohibited private conduct, or other regulatory controls to be superimposed upon public employment in many industries — which never before were denominated as "highly regulated". Concededly, there are aspects of control by government of police officers which differ from regulations imposed upon other workers. Those controls, however, are matters of degree, not kind. Notwithstanding this fact, and based simply upon the regulatory scheme, the Court of Appeals concluded that submission to the regulatory scheme is a *sub silentio* abdication of constitutional rights. Precedent of this Court and the realities of public employment, however, just do not support the Court of Appeals' conclusion.

While police officers concededly work in a controlled environment, it is simply inappropriate to contend that their service in a regulated industry is the equivalent of the knowing, voluntary or necessary relinquishment of traditional expectations of privacy. Police officers, while legitimately subject to governmental control, neither historically nor in this case have ever been led to believe that their service in a law enforcement capacity concomitantly precludes all expectations of privacy. Prior to this case, police officers certainly had no reason to assume that their mere status of employment would result in complete inapplicability of traditional constitutional principles under the Fourth Amendment. Certainly, as a matter of constitutional history, this Court has never authorized relinquishment of constitutional rights simply because of the employee's status as a police officer. While there may be diminished expectations of privacy by virtue of governmental employment, this case effectively constitutes

wholesale abolition of those expectations. Never before has this Court sanctioned outright exclusion of governmental employees from the ambit of traditional constitutional principles.

For example, the Fifth Amendment right against self-incrimination has been applied to law enforcement officials. *See Garrity v. New Jersey,* 385 U.S. 493, 17 L. Ed. 2d 562, 87 S. Ct. 616 (1987); ("policemen . . . are not relegated to a watered-down version of constitutional rights . . . " *id.* at 616). Similarly, police officers have the right to speak out on matters of public concern under the First Amendment, notwithstanding a presumed interest of their employers in precluding dissent within the ranks. *Connick v. Myers,* 461 U.S. 138, 183 S.Ct. 1684, 75 L. Ed. 2d 708 (1983). At the very least, a careful balancing test is required, weighing the need for governmental action against expected privacy interests before any constitutional right, including Fourth Amendment protections, is infringed. The Court of Appeals' decision, however, completely ignores any balancing of interests. A police officer, simply by virtue of his status in law enforcement, is now effectively outside the ambit of this Court's historic protections against unreasonable searches and seizures.

This abdication of analysis, and consequent failure to adhere to this Court's recent pronouncements on Fourth Amendment jurisprudence, is the root cause of the problem in this case. *O'Connor v. Ortega,* 94 L. Ed. 2d at 728, sets out the proper test, and best explains the deficiency in the Court of Appeals' decision:

> Public employer intrusions on the constitutionally protected privacy interests of government employees for non-investigatory, work-related purposes, as well as for investigations of work-related misconduct, should be judged by the standard of reasonableness under all the circumstances. *Under this reasonableness standard,*

> *both the inception and the scope of the intrusion must be reasonable.* (Emphasis supplied.)

Interestingly, virtually every court which has considered the "administrative search" exception contemplated by the highly regulated industry test has rejected the theory of *Shoemaker* and the reasoning of the court below. *See Lovelorn v. City of Chatanooga,* 846 F.2d 1539 (6th Cir. 1988); *Capua v. City of Plainfield,* 843 F. Supp. 1507 (D. N.J. 1986); *Penny v. Kennedy,* 846 F.2d 1564 (6th Cir. 1988); *See also, Fraternal Order of Police v. Newark,* 524 A.2d 430 (N.J. App. Div. 1987). These courts, as have most courts throughout the United States, instead follow this Court's analysis as enunciated in *O'Connor v. Ortega, supra.* Acknowledging the initial need for proof that a search is "justified in its inception", these courts recognized that the complete absence of a claim, let alone proof, of a drug problem is a sufficient indication that the least, rather than most, intrusive means for ferreting out illegal activities should be implemented. The court below, however, turning this Court's analysis on its head, concludes that the complete absence of a problem, or at least any articulable suspicion of it, nonetheless justifies the wholesale invasion of rights of all individuals, the innocent as well as the presumed guilty. Neither *O'Connor,* nor any other decisions of this Court, warrant the conclusion of the Court of Appeals.

Police officers recognize that their activities and conduct may be more regulated than less vital forms of governmental employment. Yet the Court of Appeals' analysis discards the baby with the bath water. Other means certainly exist for discovering illegal behavior by police without subjecting the wholly innocent to the same invasions of privacy as the purportedly guilty. Surely, some initial showing of a significant drug abuse problem in the Police Department should be required before wholesale abolition of protections against unreasonable searches and seizures is authorized by this Court. Some effort must be made to calibrate

the chosen means of remedy with the scope of the problem. In this case, however, there is no documented (or alleged) drug problem; rather, there exists only an undifferentiated fear that some problem might arise in the future. Similarly, there is no articulable suspicion of drug use by any particular officer which would provide a "reasonable" ground for a search without a warrant. If the court's "administrative search" analysis is an acceptable explanation for relaxing constitutional requirements, however, there no longer exists any reason to even pay lip service to constitutional principles.

Moreover, even assuming, *arguendo,* that police work constitutes a "highly regulated industry", the precedent of this Court upon which the Court of Appeals purportedly relies simply will not support this effort for intrusive searches of persons, rather than places. *New York v. Burger, supra; Marshall v. Barlow's, Inc., supra.* In virtually all of this Court's prior decisions in this area, commercial enterprises and places, historically subject to governmental inspection, were the issue in the Court's analysis. Here, in contrast, the Court of Appeals has moved into remarkably virgin territory, authorizing demeaning searches of intimate bodily functions of the individual, rather than mere inspections of the premises of business enterprises. *See, e.g., Camara v. Municipal Court,* ("the inspections are neither personal in nature nor aimed at the discovery of a crime. They involve a relatively limited invasion of the urban citizen's privacy" *id.* at 538). In contrast, random searches of the bodily wastes of governmental employees to search for improprieties, without any articulable evidence of wrongdoing, virtually eliminates any remaining protections which the Fourth Amendment previously provided.

Indeed, the most alarming aspect of this decision is that the seeds for a quickened and inexorable elimination of basic constitutional principles will be firmly planted by this case. While the Fourth Amendment has historically been deemed to require

a warrant, that has long been dispensed with as an automatic prerequisite in evaluating the propriety of a search. *O'Connor v. Ortega, supra.* In its stead, this Court has recognized that the Fourth Amendment's touchstone is "reasonableness," and that careful adherence to this goal may sometimes serve as a substitute for the warrant requirement. *T.L.O. v. New Jersey, supra.* Yet even the indicia of "reasonableness", a traditional prerequisite in any "search" of a person by the government, now apparently appears ready to be discarded. Indeed, there can be no doubt that virtually all protections guaranteed by the Fourth Amendment will be gone if the reasoning of the court below is accepted. Neither a warrant, review of facts by a neutral magistrate, probable cause, reasonable suspicion, or any other objective or individualized requirements which might justify piercing an expected zone of privacy need be proffered. Instead, talismanic invocation of "highly regulated industry" will be sufficient to overcome restraints upon governmental searches. Persons and their property will be subject to intrusive conduct previously prohibited. Once this constitutional analysis of the government's right to search is affirmed, the concept of "reasonableness" which gives the Fourth Amendment vitality will be eroded beyond recognition.

Indeed, the extension of the reasoning of the court below to many, if not most, forms of employment in both the private and public sector should be apparent. Regulated professions such as judges, physicians, lawyers, engineers, architects, pharmacists and a host of others surely could equally be the target of the same theory employed with reference to police. All of these professions are subject to extensive review and control by regulatory agencies, often culminating in the government's ability to preclude totally the practice of the profession. Governmental regulation of many aspects of employment, including codes of conduct, the need for the highest personal and professional standards, and assurances to the public of integrity and probity, while generally expected and often welcomed, has never previously been thought to preempt

enjoyment of traditional Fourth Amendment protections. Yet that is precisely the result which must follow if the reasoning of the court below is accepted.

In short, the decision of the Court of Appeals is an ominous and dangerous departure from previously settled constitutional jurisprudence. It distorts every prior decision of this Court beyond recognition. It misstates or misapplies every one of this Court's limited exceptions to the general rule of warrant and probable cause before governmental searches for illegal activity may be conducted. Indeed, it effectively constitutes an abolition of any protections previously extended by the Fourth Amendment against unreasonable searches. For these reasons, review of the decision of the court below is urgently required.

CONCLUSION

For all of the foregoing reasons, *amicus* New Jersey State PBA respectfully requests that the requested petition for certiorari should be granted.

Respectfully submitted,

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